TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 250.

EDWIN D. CARTER, PLAINTIFF IN ERROR,

vs.

CHARLES RUDDY, CHARLES ROBBINS, MICHAEL McMURRAY, FREDERICK A. STEVENS, M. J. DONNELLY, C. M. PATTERSON, JOHN DOE, AND RICHARD ROE.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED MARCH 29, 1895.

(15,850.)

(15,850.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 250.

EDWIN D. CARTER, PLAINTIFF IN ERROR,

vs.

CHARLES RUDDY, CHARLES ROBBINS, MICHAEL McMURRAY, FREDERICK A. STEVENS, M. J. DONNELLY, C. M. PATTERSON, JOHN DOE, AND RICHARD ROE.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.

	Original.	Print.
Caption	*a*	1
Transcript from circuit court of the United States for the district of Idaho	1	1
Writ of error	1	1
Complaint	2	2
Summons	3	3
Sheriff's return	4	3
Demurrer to complaint	5	5
Stipulation as to time to answer	5	5
Answer of Charles F. Robbins	6	6
Michael L. Murray	8	8
Frederick A. Stevens	10	10
Charles F. Ruddy	11	11
C. M. Patterson	13	13
Matthew J. Donnelly	15	15
Verdict	17	17
Judgment	17	17

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 26, 1896.

	Original.	Print.
Clerk's certificate to judgment-roll	18	18
Bill of exceptions	18	18
Charge to the jury	19	19
Exceptions to charge	25	25
Exceptions to refusal to charge	26	25
Judge's certificate to bill of exceptions	29	28
Motion for judgment notwithstanding verdict	30	29
Stipulation as to settlement of bill of exceptions	30	30
Order denying motion for judgment notwithstanding verdict	31	30
Order extending time to file bill of exceptions	31	31
Order extending time to serve amendments to bill of exceptions	31	31
Order extending time to serve amendments to bill of exceptions	32	31
Order denying motion for new trial	32	32
Notice as to bill of exceptions	32	32
Bill of exceptions	33	32
Evidence for plaintiff	33	33
Testimony of Edwin D. Carter	33	33
Plaintiff's Exhibit A—Land office receipt and field-notes of survey	34	34
B—Power of attorney from Bourke *et ux.* to Wallace, Feb. 27, 1883	37	37
C—Deed from Bourke to Carter, July 31, 1886	39	39
E—Tax receipt, Nov. 15, 1887	43	43
F—Tax receipt, Dec. 7, 1888	44	44
G—Tax receipt, Dec. 13, 1888	44	44
Testimony of Henry F. Howes	54	53
E. H. Moffatt	64	64
Plaintiff's Exhibit I—Notice of *lis pendens*	66	66
Testimony of D. C. McKissick	67	67
George McLaughlin	69	69
Mrs. Lucy A. Wallace	70	70
W. C. Human	73	73
George I. Bell	74	74
Plaintiff's Exhibit J—Notice to Ruddy & Murray	76	76
Plaintiff rests	79	79
Evidence for defendants	79	79
Defendants' Exhibit No. 1—Petition for removal to United States court	79	79
Defendants' Exhibit No. 2—Letter of Commissioner of General Land Office to register and receiver at Cœur d'Alene, Idaho, January 24, 1887	81	81
Defendants' Exhibit No. 3—Letter of register at Cœur d'Alene, Idaho, to W. R. Wallace, February 3, 1887	83	83
Defendants' Exhibit No. 4—Power of attorney from Bourke to Wells, May 7, 1866	84	84
Defendants' Exhibit No. 5—Copies of original and duplicate scrip, &c.	86	86
Defendants' Exhibit No. 6—Patent in favor of Walter Bourke	90	90
Defendants' Exhibit No. 7—Certain papers in connection with the issue of scrip No. 430, &c.	92	92

	Original.	Print.
Defendants' Exhibit No. 10—Proceedings of county commissioners of Shoshone county	103	104
Testimony of George R. Trask	105	106
T. A. Dowd	106	108
P. J. Hollahan	107	108
J. M. Harris	109	110
Charles Ruddy	110	111
Defendants' Exhibit No. 13—Notice of location by Ruddy, February 19, 1889	111	112
Defendants' Exhibit No. 14—Notice of location by Murray, February 19, 1889	112	113
Testimony of M. J. Donnelly	113	114
C. A. Baldwin	114	115
Thomas F. Hanley	115	116
Pat. Ryan	115	117
W. D. McFadden	116	117
Defendants rest	116	117
Evidence for plaintiff in rebuttal	116	117
Testimony of Edwin D. Carter	116	117
George I. Bell	116	118
Plaintiff rests	117	118
Charge to the jury	117	118
Exceptions to charge	123	124
Exceptions to refusal to charge	124	125
Judge's certificate to bill of exceptions	127	128
Petition for writ of error	127	129
Assignment of errors	128	129
Bond on writ of error	134	135
Citation	135	136
Clerk's certificate to transcript	135	137
Opinion	137	138
Judgment	143	141
Petition for writ of error	144	141
Assignment of errors	145	141
Bond on writ of error	158	147
Clerk's certificate to transcript	161	149
Writ of error	162	149
Citation	164	150
Acceptance of service of citation	165	151
Order to send up maps marked Plaintiff's Exhibit D and Defendants' Exhibits 12 and 14	166	151
Plaintiff's Exhibit D—Map	168	152
Defendants' Exhibit No. 12—Map	169	152
Defendants' Exhibit No. 14—Map	170	152

a *Transcript of Record.*

United States Circuit Court of Appeals for the Ninth Circuit, October Term, 1891.

EDWIN D. CARTER, Plaintiff in Error,
vs.
CHARLES RUDDY, CHARLES ROBBINS, MICHAEL MCMURRAY, Frederick A. Stevens, M. J. Donnelly, C. M. Patterson, John Doe, and Richard Roe, Defendants in Error. } No. 56.

Error to the circuit court of the United States for the district of Idaho.

Endorsed: Filed Jun- 21, 1892. F. D. Monckton, clerk.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the district of Idaho, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment of a plea which is in the said circuit court, before you, or some of you, between Edwin D. Carter, plaintiff in error, and Charles Ruddy, Charles Robbins, Michael McMurray, Frederick A. Stevens, M. J. Donnelly, C. M. Patterson, John Doe and Richard Roe, defendants in error, a manifest error hath happened, to the great damage of the said Edwin D. Carter, plaintiff in error, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the ninth circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 25th day of June next, in the said circuit court of appeals; to be then and there held, that the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 25th day of May, [SEAL.] in the year of our Lord one thousand eight hundred and ninety-two.

A. L. RICHARDSON,
Clerk of the United States Circuit Court for the District of Idaho.

Allowed by—
JAS. H. BEATTY, *Judge.*
1—250

(Endorsed :) Service of the within writ of error by copy admitted this 27th day of May, 1892. L. Vineyard, one of def'ts' att'ys. Filed May 27, 1892. A. L. Richardson, clerk.

2 *Complaint.*

In District Court, First Judicial District, in and for Shoshone County, Idaho.

EDWIN D. CARTER, Plaintiff,
vs.
CHARLES RUDDY, CHARLES ROBBINS, MICHAEL MCMURRAY, FREDERICK A. STEVENS, M. J. DONNELLY, C. M. PATTERSON, JOHN DOE, and RICHARD ROE, Defendants.

Above-named plaintiff complains of Charles Ruddy, Charles Robbins, Michael McMurray and Frederick A. Stevens, above-named defendants, also of M. J. Donnelly and C. M. Patterson, whose Christian names are unknown to plaintiff, also of John Doe and Richard Roe, whose real names are unknown to plaintiff, defendants herein and for cause of such complaint avers:

(1.)

That on the 19th day of February, 1889, plaintiff owned, was seized and possessed and entitled to the possession of that certain tract or parcel of land situated in the county of Shoshone and Territory of Idaho described as follows, viz: The north half of block number twenty-two (22) in the town of Wallace, in said county and Territory as said half block is described on the plat of said town, said north half of said block twenty-two (22) being bounded on the north by Cedar street, on the west by Sixth street, on the east by Seventh street, and on the south by an alley, said half block being three hundred feet long in an east and west and one hundred feet wide in a north and south direction.

(2.)

That while plaintiff was the owner of, seized, possessed and entitled to the possession of said north half of said block No. 22 in said town of Wallace as aforesaid, the defendants afterwards, viz., on the 19th day of February, 1889, and without right or title, entered into possession of the demanded premises and ousted and ejected plaintiff therefrom and from the whole thereof (except a small parcel of the same designated on the map aforesaid as lots twelve (12) and twenty (20) in said block twenty-two (22)), and now unlawfully withhold the possession thereof from plaintiff to his damage in the sum of ten thousand dollars.

(3.)

That the value of the rents, issues and profits of said premises from the said 19th day of February, 1889, and while plaintiff has

been excluded therefrom by defendants, is the sum of one thousand dollars.

Wherefore plaintiff prays judgment against defendants:

3 1st. For the recovery of the possession of the demanded premises and for the sum of ten thousand dollars for withholding the possession thereof.

2nd. For the further sum of one thousand dollars, the value of said rents, issues and profits, and for costs of suit.

WM. H. CLAGGETT,
Att'y for Pl't'ff.

TERRITORY OF IDAHO, } ss:
County of Shoshone, }

George I. Bell, being first duly sworn, says under oath that he has read the foregoing complaint and knows the contents thereof and that the same is true of his own knowledge. That he is the agent and attorney-in-fact of the said plaintiff in the within-named county and Territory, and has personal knowledge of all of the facts set forth in the foregoing complaint. That said plaintiff is now absent from above-named county and Territory, and is in the State of Wisconsin, and that this is the reason why said complaint is not verified by said plaintiff.

GEO. I. BELL.

Subscribed and sworn to before me this 10th day of April, 1889.
[SEAL.] C. M. HALL,
Notary Public.

(Endorsed as follows:) No. 20. 502.
Edwin D. Carter *vs.* Charles Ruddy *et al.* Complaint filed April 12, A. D. 1889. F. H. Grierson, clerk, by Barry N. Hillard, deputy. Wm. H. Claggett, att'y for pl'ff. Filed April 7, 1891. A. L. Richardson, clerk.

Summons.

In the District Court of the First Judicial District of Idaho Territory in and for Shoshone County.

EDWIN D. CARTER, Plaintiff,
vs.
CHAS. RUDDY, CHAS. ROBBINS, MICHAEL MCMURRAY, FREDERICK A. STEVENS, M. J. DONNELLY, C. M. PATTERSON, JOHN DOE, and RICHARD ROE, Defendants.

The Territory of Idaho to Chas. Ruddy, Chas. Robbins, Michael McMurray, Frederick A. Stevens, M. J. Donnelly, C. M. Patterson, John Doe, and Richard Roe, defendants:

You are hereby notified that there is now on file in the office of the clerk of the district court of the first judicial district of
4 said Territory, in Murray, county of Shoshone, the complaint of the above-named plaintiff wherein judgment is demanded against you for the recovery of the possession of the following-de-

scribed real estate, situate in the town of Wallace, Shoshone county, Idaho Territory, and described as follows, to wit: Being the north half of block No. 22 in the town of Wallace as said half block is described on the plat of said town, said north half of block 22 being bounded on the north by Cedar street, on the west by Sixth street, on the east by Seventh street, and on the south by an alley, said half block being 300 feet long in an east and west, and 100 feet wide in a north and south direction.

The plaintiff alleges that on February 19th, while he was the rightful owner of and in the possession of said real estate, that you, the defendants, by force and violence ousted and ejected the plaintiff therefrom, and now hold possession of the whole thereof to the exclusion of the plaintiff herein. 2d. For the sum of $10,000 damages for the wrongful withholding of the same from the plaintiff, and for the further sum of $1,000, the value of the rents, issues and profits of the same since February 19, 1889, and for the costs of this action.

And you are also notified that unless you appear and answer to said complaint within ten days after the service hereof, if served within Shoshone county, and within twenty days if served out of said county, but within said judicial district, and within forty days if served out of said district (exclusive of the day of service), the plaintiff will take default against you and apply to the court for the relief demanded in the complaint herein.

Given under my hand and the seal of the district court
[SEAL.] of the first judicial district of Idaho Territory, in and for Shoshone county, this twelfth day of April, A. D. 1889.

F. H. GRIERSON, *Clerk*,
By BARRY N. HILLARD, *Deputy*.

OFFICE OF THE SHERIFF OF THE COUNTY OF SHOSHONE.

I hereby certify that I received the within summons on the thirteenth day of April, A. D. 1889, and personally served the same on the fifteenth day of April, A. D. 1889, on Charles Ruddy, Charles Robbins, Michael McMurray, Frederick A. Stevens, M. J. Donnelly, C. M. Patterson, John Doe, and Richard Roe, being the defendants named in the said summons, by delivering to and leaving with said defendants personally in the town of Wallace, and south fork of Cœur d'Alene river, county of Shoshone, a copy of said summons, and with defendant Charles Ruddy a true and correct copy of the complaint in the action named in said summons.

Dated this seventeenth day of April, A. D. 1889.

R. A. CUNNINGHAM, *Sheriff*,
By J. T. ARGYLE, *Undersheriff*.

5 Endorsed as follows: No. 20. No. 502. Original summons. District court, county of Shoshone. Edwin D. Carter, plaintiff, against Charles Ruddy *et al.*, defendants. Filed on return April 17, 1889. F. H. Grierson, clerk, by Barry N. Hillard, deputy. Wm. H. Claggett, att'y for pl't'ff. Filed April 7, 1891. A. L. Richardson, clerk.

In the District Court of the First Judicial District of Idaho Territory in and for Shoshone County.

EDWIN D. CARTER, Plaintiff,
vs.
CHAS. RUDDY, CHAS. ROBBINS, MICHAEL MCMURRAY, Frederick A. Stevens, M. J. Donnelly, C. M. Patterson, John Doe, and Richard Roe, Defendants. } No. 502.

Now come the defendants above named and demur to the complaint of the plaintiff filed herein, and for cause of demurrer allege:

1. That the said complaint does not state facts sufficient to constitute a cause of action.

WALTER A. JONES,
Att'y for Def'ts.

Endorsed as follows: No. 20. No. 502. Edwin D. Carter, plaintiff, *vs.* Charles Ruddy *et al.*, defendants. Demurrer filed April 24, A. D. 1889. F. H. Grierson, clerk, by Barry N. Hillard, deputy. Walter A. Jones, att'y for def'ts. Filed April 7, 1891. A. L. Richardson, clerk.

In the District Court of the First Judicial District of Idaho Territory in and for Shoshone County.

EDWIN D. CARTER, Plaintiff,
vs.
CHARLES RUDDY *et al.*, Defendants. } No. 502.

It is hereby stipulated that the defendants in this case have time until Monday, June 24, 1889, in which to file and serve an answer or answers to the plaintiff's complaint filed herein.

WM. H. CLAGGETT,
Att'y for Pl'ff.
FRANK GANAHL,
WALTER A. JONES,
Att'ys for Def'ts.

Murray, June 15, 1889.

Endorsed as follows: No. 20. 502. Edwin D. Carter *vs.* Charley Ruddy *et al.* Stipulation filed June 15, 1889. F. H. Grierson, clerk, by Barry N. Hillard, deputy. A. L. Richardson, clerk. Filed April 7, 1891. F. H. Grierson, clerk, by Barry N. Hillard, deputy. A. L. Richardson, clerk.

6 In the District Court of the First Judicial District of the Territory of Idaho in and for Shoshone County.

EDWIN D. CARTER, Plaintiff,
vs.
CHARLES RUDDY, CHARLES ROBBINS, MICHAEL MCMURRAY, Frederick A. Stevens, M. J. Donnelly, C. M. Patterson, John Doe, and Richard Roe, Defendants.

Now comes Charles F. Robbins, one of the defendants, named Charles Robbins in plaintiff's complaint herein, and answering the complaint, denies:

1st. That on the nineteenth day of February, 1889, or at any time before or since said date, or at all, the plaintiff owned or ever was seized or possessed or entitled to the possession at any time, or at all, of all or any part of that certain tract or parcel of land situated in the county of Shoshone and Idaho Territory, and described as follows, viz: The north half of block number twenty-two (22) in the town of Wallace in said county and Territory, as said half block is described on the plat of said town, said north half of said block twenty-two (22) being bounded on the north by Cedar street, on the west by Sixth street, on the east by Seventh street, and on the south by an alley. Said half block being 300 feet long in an east and west, and 100 feet wide in a north and south direction (except two separate lots, pieces or parcels of land described on the plat of said town as lots twelve (12) and twenty (20) in said block twenty-two (22), each of said lots being 25 feet wide and 100 feet long).

2. Denies that on the nineteenth day of February, 1889, or at any other time, or at all, or while the plaintiff was the owner of, or seized or possessed or entitled to the possession of said north half of said block No. 22 without any right or title he entered into the possession of the said premises or any part thereof and ousted or ejected plaintiff therefrom, and denies that he now unlawfully withholds or ever has unlawfully withheld the possession thereof, or of any part thereof, from plaintiff, to the plaintiff's damage in the sum of ten thousand dollars, or in any other sum or at all.

3. Denies that the value of the rents, issues or profits of the said premises, or any part thereof, from the said nineteenth day of February, 1889, or from any time, or at all, is the sum of $1,000, or any other sum.

And the said Charles F. Robbins further answering said complaint alleges that he is a citizen of the United States and a resident of the Territory of Idaho. That on the twenty-fifth day of February, 1889, and for a long time before said date, the two lots, pieces or parcels of land situate, being and lying in the town of Wallace, county of Shoshone and Territory of Idaho, known as and designated upon the plat of said town as lots numbers ten (10)
7 and twenty-four (24) in block No. 22. Each of said lots being 25 feet wide and 100 feet long, and included in the land described in plaintiff's complaint, were public lands of the United States entirely vacant and unoccupied, and were not owned, held

or occupied by any person or persons for any purpose whatsoever, and that while the same were so vacant and unoccupied, to wit: on the twenty-fifth day of February, 1889, he, the said Charles F. Robbins, entered upon, located and appropriated said lots as residence or town lots; that after entering thereon he placed written notices of location on each of said lots, describing the lots so located and appropriated, giving the name of the locator, and the date of the location, and inclosed the same by actual inclosures consisting of good and substantial board fences, and complied in all respects with the laws, and the customs, rules and regulations of the said town of Wallace, and the inhabitants thereof, and caused the said notices of location to be filed and recorded in the proper books of records in the office of the recorder of said town of Wallace, and thereby became and was the owner (except as against the paramount title of the United States) and the rightful possessor of said lots or pieces of land. That the said Charles F. Robbins has remained in the continuous quiet and peaceable possession of said lots since said date of location, and that he does — now claim, nor ever has claimed, or been in possession of any other part or portion of the land described in plaintiff's complaint herein.

Wherefore defendant prays judgment that his title and right of possession in and to said lots numbers ten (10) and 24 in block No. 22 aforesaid be quieted and confirmed and that he have judgment for costs.

CHARLES F. ROBBINS.

FRANK GANAHL,
WALTER A. JONES,
Att'ys for Def't Charles F. Robbins.

TERRITORY OF IDAHO, } *ss:*
Shoshone County, }

Charles F. Robbins being duly sworn says he is one of the defendants in the above-entitled action, that he has heard read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge.

CHARLES F. ROBBINS.

Sworn to and subscribed before me this third day of June, A. D. 1889.

ANDREW B. GRACE,
Justice of the Peace in and for Shoshone County.

(Endorsed as follows:) No. 20. No. 502. Edwin D. Carter, plaintiff, *vs.* Charles Ruddy *et al.*, defendants. Answer of Charles F. Robbins. Filed June 24, A. D. 1889. F. H. Grierson, clerk, by Barry N. Hillard, deputy. Service accepted by copy June 24, 1889. Wm. H. Claggett, plaintiff's attorney. Ganahl &
8 Jones, attorneys for defendants. Filed April 7, 1891. A. L. Richardson, clerk.

In the District Court of the First Judicial District of Idaho Territory in and for Shoshone County.

EDWIN D. CARTER, Plaintiff,
vs.
CHARLES RUDDY, CHARLES ROBBINS, MICHAEL MCMURRAY, Frederick A. Stevens, M. J. Donnelly, C. M. Patterson, John Doe, and Richard Doe, Defendants.

Now comes Michael L. Murray, one of the defendants, named in the complaint herein Michael McMurray, and for answer to the complaint, denies—

1st. That on the 19th day of February, 1889, or at any other time before or since said date, or at all, the plaintiff owned or ever was seized, or possessed, or entitled to the possession at any time or at all, of all or any part of that certain tract or parcel of land situated in the county of Shoshone and Territory of Idaho, and described as follows, viz: The north half of block number twenty-two (22) in the town of Wallace, in said county and Territory, as said block is described on the plat of said town. Said north half of said block twenty-two (22) being bounded on the north by Cedar street, on the west by Sixth street, on the east by Seventh street, and on the south by an alley. Said half block being three hundred feet long in an east and west, and one hundred feet wide in a north and south direction. (Except two separate lots, pieces and parcels of land described on the plat of said town as lots twelve (12) and twenty (20) in said block twenty-two, each of said lots being 25 feet wide and 100 feet long.)

2d. Denies that on the nineteenth day of February, 1889, or at any other time, or at all, or while the plaintiff was the owner of or seized or possessed or entitled to the possession of said north half of said block number twenty-two, without any right or title, he entered into the possession of the said premises or any part thereof, and ousted or ejected plaintiff therefrom, and denies that he now unlawfully withholds or ever has unlawfully withheld the possession thereof, or any part thereof, from plaintiff, to the plaintiff's damage in the sum of ten thousand dollars, or in any other sum or at all.

3d. Denies that the value of the rents, issues or profits of the said premises, or any part thereof, from the said 19th day of February, 1889, or from any time, or at all, is the sum of one thousand dollars, or any other sum.

And the said Michael L. Murray further answering said complaint alleges that he is a citizen of the United States and a resident of the Territory of Idaho. That on the 19th day of February, 1889, and for a long time before said date, the two lots, pieces, or parcels of land situate being and lying in the town of Wallace, county of Shoshone, and Territory of Idaho, known as and
9 designated upon the plat of said town as lots numbers six and eight in block number twenty-two. Each of said lots being twenty-five feet wide and one hundred feet long, and included in the area of the land described in plaintiff's complaint, were

public lands of the United States, entirely vacant and unoccupied, and were not owned, held, or occupied by any person or persons for any purpose whatsoever; and that while the same were so vacant and unoccupied, to wit: on the 19th day of February, 1889, he, the said Michael L. Murray, entered upon, located and appropriated said lots as residence or town lots; that after entering thereon he placed a written notice of location thereon, describing the lots so located and appropriated, giving the name of the locator and the date of the location, and inclosed the same by an actual inclosure, consisting of a good and substantial board fence, and complied in all respects with the laws, and the customs, rules and regulations of the said town of Wallace, and the inhabitants thereof, and caused the said notice of location to be filed and recorded in the office of the recorder of said town of Wallace, and thereby became and was the owner (except as against the paramount title of the United States) and the rightful possessor of said lots or pieces of land; that he, the said Michael L. Murray, has remained in the continuous quiet and peaceable possession of said lots since said date of location, and that he does not now claim, nor ever has claimed or been in possession of any other part or portion of the land described in plaintiff's complaint herein.

Wherefore defendant prays judgment that his title and right of possession in and to said lots Nos. 6 and 8 in block No. 22 aforesaid be quieted and confirmed, and that he have judgment for costs.

FRANK GANAHL,
WALTER A. JONES,
Att'ys for Def't Michael L. Murray.

TERRITORY OF IDAHO, } ss:
Shoshone County, }

Michael L. Murray, being first duly sworn, says that he is one of the defendants in the above-entitled action; that he has heard read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge.

MICHAEL L. MURRAY.

Sworn to and subscribed before me this 5th day of June, A. D. 1889.

ANDREW B. GRACE,
Justice of the Peace in and for Shoshone County.

Endorsed as follows: No. 20. No. 502. Edwin D. Carter, plaintiff, *vs.* Charles Ruddy *et al.*, defendants. Answer of Michael L. Murray. Filed June 24, A. D. 1889. F. H. Grierson, clerk, by Harry N. Hillard, deputy. Service accepted by copy June 24, 1889. Wm. H. Glaggett, pl'ff's att'y. Ganahl & Jones, att'ys for def't. Filed April 7, 1891. A. L. Richardson, clerk.

10 In the District Court of the First Judicial District of the Territory of Idaho in and for Shoshone County.

EDWIN D. CARTER, Plaintiff,
vs.
CHAS. RUDDY, CHAS. ROBBINS, MICHAEL MCMURRAY, FREDERICK A. STEVENS, M. J. DONNELLY, C. M. PATTERSON, JOHN DOE, and RICHARD ROE, Defendants.

Now comes Frederick A. Stevens, one of the defendants, and for answer to the complaint herein, upon information and belief denies:

1st. That on the 19th day of February, 1889, or at any time before or since said date, or at all, the plaintiff owned or ever was seized, or possessed, or entitled to the possession at any time, or at all, of all or any part of that certain tract or parcel of land situate in the county of Shoshone, and Territory of Idaho, and described as follows, viz: The north half of block number (22) twenty-two, in the town of Wallace, in said county and Territory, as said half block is described on the plat of said town. Said north half of said block twenty-two (22) being bounded on the north by Cedar street, on the west by Sixth street, on the east by Seventh street, and on the south by an alley.

Said half block being three hundred (300) feet long in an east and west, and one hundred (100) feet wide in a north and south direction (except two separate lots, pieces or parcels of land described on the plat of said town as lots twelve (12) and twenty (20) in said block twenty-two (22), each of said lots being 25 feet wide and 100 feet long).

2d. Denies that on the 19th day of February, 1889, or at any other time, or at all, or while the plaintiff was the owner of, or seized or possessed, or entitled to the possession of said north half of said block number twenty-two (22) without any right or title, he entered into the possession of the said premises or any part thereof, and ousted or ejected plaintiff therefrom; and denies that he now unlawfully withholds, or ever has unlawfully withheld, the possession thereof, or of any part thereof from plaintiff, to the plaintiff's damage in the sum of ten thousand dollars, or in any other sum, or at all.

3d. Denies that the value of the rents, issues or profits of the said premises, or any part thereof, from the said 19th day of February, 1889, or from any time, or at all, is the sum of one thousand dollars, or any other sum.

Wherefore defendant prays to be dismissed and that he have judgment for costs.

FRANK GANAHL AND
WALTER A. JONES,
Attorneys for Defendant.

11 TERRITORY OF IDAHO, } ss:
County of Shoshone, }

Walter A. Jones, being duly sworn, says he is one of the attorneys for Frederick A. Stevens, one of the defendants named in the above-entitled action; that he has heard read the foregoing answer, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated to be on information or belief, and as to those matters that he believes it to be true. The reason why this affidavit is not made by the said Frederick A. Stevens is because the said Stevens is absent from this county, where his attorney, this affiant, resides.

WALTER A. JONES.

Subscribed and sworn to before me this 24th day of June, A. D. 1889.

[SEAL.] BARRY N. HILLARD,
Notary Public.

(Indorsed as follows:) No. 20. No. 502. Edwin D. Carter, pl'ff, *vs.* Charles Ruddy *et al.*, defendants. Answer of Frederick A. Stevens, filed June 24, 1889. F. H. Grierson, clerk, by Barry N. Hillard, deputy. Service accepted by copy this 24th day of June, 1889. Wm. H. Claggett, pl't'ff's att'y. Ganahl & Jones, att'ys for defendant. Filed April 7, 1891. A. L. Richardson, clerk.

In the District Court of the First Judicial District of Idaho Territory in and for Shoshone County.

EDWIN D. CARTER, Plaintiff,
vs.
CHAS. RUDDY, CHAS. ROBBINS, MICHAEL MCMURRAY, FREDERICK A. STEVENS, M. J. DONNELLY, C. M. PATTERSON, JOHN DOE, and RICHARD ROE, Defendants.

Now comes Charles F. Ruddy, one of the defendants named in the complaint herein Charles Ruddy, and for answer to the complaint denies:

1st. That on the 19th day of February, 1889, or at any time before or since said date, or at all, the plaintiff owned, or ever was seized or possessed, or entitled to the possession at any time, or at all, of all or any part of that certain tract or parcel of land situated in the county of Shoshone and Territory of Idaho, and described as follows, viz.: The north half of block number twenty-two (22), in the town of Wallace, in said county and Territory, as said half block is described on the plat of said town. Said north half of said block twenty-two (22) being bounded on the north by Cedar street, on the west by Sixth street, on the east by Seventh street, and on the south by an alley. Said half block being three hundred feet long in an east and west, and one hundred feet wide in a north and south di-

rection (except two separate lots, pieces or parcels of land
12 described on the plat of said town as lots twelve (12) and twenty (20) in said block twenty-two, each of said lots being 25 feet wide and one hundred feet long).

2d. Denies that on the 19th day of February, 1889, or at any other time, or at all, or while the plaintiff was the owner of, or seized or possessed or entitled to the possession of said north half of said block No. twenty-two, without any right or title he entered into the possession of the said premises or any part thereof, and ousted or ejected plaintiff therefrom, and denies that he now unlawfully withholds, or ever has unlawfully withheld, the possession thereof, or of any part thereof, from plaintiff, to the plaintiff's damage in the sum of ten thousand dollars, or in any other sum, or at all.

3d. Denies that the value of the rents, issues or profits of the said premises, or any part thereof, from the said nineteenth day of February, 1889, or from any time, or at all, is the sum of $1,000, or any other sum.

And the said Charles F. Ruddy further answering said complaint alleges that he is a citizen of the United States and a resident of the Territory of Idaho; that on the nineteenth day of February, 1889, and for a long time before said date, the two lots, pieces, or parcels of land situate and lying in the town of Wallace, county of Shoshone, and Territory of Idaho, known as and designated upon the plat of said town as lots Nos. 2 and 4 in block No. 22, each of said lots being 25 feet wide and 100 feet long, and included in the area of the land described in plaintiff's complaint, were public lands of the United States entirely vacant and unoccupied, and were not owned, held, or occupied by any person or persons for any purpose whatever, and that, while the same were so vacant and unoccupied, to wit, on the nineteenth day of February, 1889, he, the said Charles F. Ruddy, entered upon, located, and appropriated said lots as residence or town lots; that, after entering thereon, he placed a written notice of location thereon, describing the lots so located and appropriated, giving the name of the locater, the date of the location, and a description of the land so located, and inclosed the same by an actual inclosure, consisting of a good and substantial board fence, erected a frame dwelling-house thereon, resided therein and complied in all respects with the laws, and the customs, rules, and regulations of the said town of Wallace and the inhabitants thereof, and caused the said notice of location to be filed and recorded in the proper books of record in the office of the recorder of said town of Wallace, and thereby became and was the owner (except as against the paramount title of the United States) and the rightful possessor of said lots or pieces of land; that he, said Charles F. Ruddy, has remained in the continuous quiet and peaceable possession of said lots since said date of location, and that he does not now claim, nor ever has claimed, or been in possession of, any other part or portion of the land described in plaintiff's complaint herein.

Wherefore defendant prays judgment that his title and
13 right of possession in and to said lots Nos. 2 and 4 in block No.

22 aforesaid be quieted and confirmed, and that he have judgment for costs.

FRANK GANAHL,
WALTER A. JONES,
Att'ys for Def't Chas. F. Ruddy.

TERRITORY OF IDAHO, } ss:
Shoshone County, }

Charles F. Ruddy, being duly sworn, says he is one of the defendants named in the above-entitled action, that he has heard read the foregoing answer, and knows the contents thereof, and that the same is true of his own knowledge.

CHAS. F. RUDDY.

Sworn and subscribed before me this 5th day of June, A. D. 1889.

ANDREW B. GRACE,
Justice of the Peace in and for Shoshone County.

(Endorsed as follows:) No. 20. No. 502. Edwin D. Carter, pl'ff, *vs.* Charles Ruddy *et al.*, defendants. Answer of Charles F. Ruddy. Filed June 24, A. D. 1889. F. H. Grierson, clerk, by Barry N. Hillard, deputy. Service accepted by copy June 24, 1889. Wm. H. Claggett, pl't'ff's att'y. Ganahl & Jones, att'ys for defendant. Filed April 7, 1891. A. L. Richardson, clerk.

In the District Court of the First Judicial District of Idaho Territory in and for Shoshone County.

EDWIN D. CARTER, Plaintiff,
vs.
CHARLES RUDDY, CHARLES ROBBINS, MICHAEL MCMURRAY, FREDERICK A. STEVENS, M. J. DONNELLY, C. M. PATTERSON, JOHN DOE, and RICHARD ROE, Defendants.

Now comes C. M. Patterson, one of the defendants, and for answer to the complaint herein denies:

1st. That on the 19th day of February, 1889, or at any time before or since said date, or at all, the plaintiff owned, or ever was seized, or possessed or entitled to the possession at any time, or at all, of all or any part of that certain tract or parcel of land situated in the county of Shoshone and Territory of Idaho, and described as follows, viz: the north half of block number twenty-two (22) in the town of Wallace, in said county and Territory, as said block is described on the plat of said town, said north half of said block twenty-two (22) being bounded on the north by Cedar street, on the west by Sixth street, on the east by Seventh street, and on the south by an alley, said half block being 300 feet long in an east and west, and 100

feet wide in a north and south, direction (except two separate
14 lots, pieces, or parcels of land described on the plat of said
town as lots twelve (12) and twenty (20) in said block 22, each of said lots being 25 feet wide and 100 feet long).

2d. Denies that on the 19th day of February, 1889, or at any time, or at all, or while the plaintiff was the owner of, or seized or possessed, or entitled to the possession of said north half of said block No. 22, without any right or title, he entered into the possession of the said premises, or any part thereof, and ousted or ejected plaintiff therefrom, and denies that he now unlawfully withholds, or ever has unlawfully withheld, the possession thereof, or of any part thereof, from plaintiff, to the plaintiff's damage in the sum of $10,000, or in any sum or at all.

3d. Denies that the value of the rents, issues or profits of the said premises, or any part thereof, from the said nineteenth day of February, 1889, or from any time, or at all, is the sum of $1,000, or any other sum.

And the said C. M. Patterson further answering alleges: That he is a citizen of the United States and a resident of the Territory of Idaho. That on the seventh day of March, 1889, and for a long time prior thereto, the lot or piece of land situate being and lying in the town of Wallace, county of Shoshone and Territory of Idaho, known as and designated upon the plat of said town as lot No. 22 in block No. 22, being 25 feet wide and 100 feet long, and included in the land described in plaintiff's complaint, was public land of the United States, entirely vacant and unoccupied, and was not owned, held or occupied by any person or persons for any purpose whatsoever, and that while the same was so vacant and unoccupied, to wit: on the seventh day of March, 1889, he, the said C. M. Patterson, entered upon, located and appropriated said lot as a residence or town lot; that after entering thereon he placed a written notice of location thereon, describing the lot so located and appropriated, giving the name of the locator and the date of the location, and inclosed the same by an actual inclosure, consisting of a good and substantial board fence, and complied in all respects with the laws, and the customs, rules and regulations of the said town of Wallace and the inhabitants thereof, and caused the said notice of location to be filed and recorded in the office of the recorder of the said town of Wallace, and thereby became and was the owner (except as against the paramount title of the United States) and the rightful possessor of said lot or piece of land. That he, the said C. M. Patterson, has remained in the continuous quiet and peaceable possession of said lot since said date of location, and that he does not now claim, nor ever has claimed, or been in possession of any other part or portion of the land described in plaintiff's complaint herein.

Wherefore defendant prays judgment that his title and right of possession in and to said lot No. 22 in block No. 22 aforesaid be quieted and confirmed, and that he have judgment for costs.

FRANK GANAHL,
WALTER A. JONES,
Att'ys for Def't C. M. Patterson.

15 TERRITORY OF IDAHO, } ss:
Shoshone County, }

C. M. Patterson, being first duly sworn, says that he is one of the defendants in the above-entitled action, that he has heard read the foregoing answer, and knows the contents thereof, and that the same is true of his own knowledge.

C. M. PATTERSON.

Sworn to and subscribed before me this 5th day of June, A. D. 1889.

ANDREW B. GRACE,
Justice of the Peace in and for Shoshone County.

(Endorsed as follows:) No. 20. No. 502. Edwin D. Carter, pl'ff, *vs.* Charles Ruddy *et al.*, defendants. Answer of C. M. Patterson. Filed June 24, A. D. 1889. F. H. Grierson, clerk, by Barry N. Hillard, deputy. Service accepted by copy this 24th day of June, 1889. Wm. H. Claggett, pl'ff's att'y. Ganahl & Jones, attorneys for defendant. Filed April 7, 1891. A. L. Richardson, clerk.

In the District Court of the First Judicial District of Idaho Territory in and for Shoshone County.

EDWIN D. CARTER, Plaintiff,
vs.
CHARLES RUDDY, CHARLES ROBBINS, MICHAEL MCMURRAY, Frederick A. Stevens, M. J. Donnelly, C. M. Patterson, John Doe, and Richard Roe, Defendants.

Now comes Matthew J. Donnelly, one of the defendants, named in the complaint herein M. J. Donnelly, and for answer to the complaint denies:

1st. That on the 19th day of February, 1889, or at any time before or since said date, or at all, the plaintiff owned, or ever was seized or possessed or entitled to the possession at any time, or at all, of all or any part of that certain tract or parcel of land situated in the county of Shoshone and Territory of Idaho and described as follows, viz: The north half of block twenty-two (22) in the town of Wallace, in said county and Territory as said block is described on the plat of said town, said north half of said block twenty-two (22) being bounded on the north by Cedar street, on the west by Sixth street, on the east by Seventh street, and on the south by an alley. Said half block being 300 feet long in an east and west, and 100 feet wide in a north and south direction. (Except two separate lots, pieces or parcels of land described on the plat of said town as lots twelve (12) and twenty (20) in said block 22, each of said lots being 25 feet wide and 100 feet long.)

2d. Denies that on the 19th day of February, 1889, or at any other time, or at all, or while the plaintiff was the owner of, or seized or possessed or entitled to the possession of, said north half

feet wide in a north and south, direction (except two separate
14 lots, pieces, or parcels of land described on the plat of said town as lots twelve (12) and twenty (20) in said block 22, each of said lots being 25 feet wide and 100 feet long).

2d. Denies that on the 19th day of February, 1889, or at any time, or at all, or while the plaintiff was the owner of, or seized or possessed, or entitled to the possession of said north half of said block No. 22, without any right or title, he entered into the possession of the said premises, or any part thereof, and ousted or ejected plaintiff therefrom, and denies that he now unlawfully withholds, or ever has unlawfully withheld, the possession thereof, or of any part thereof, from plaintiff, to the plaintiff's damage in the sum of $10,000, or in any sum or at all.

3d. Denies that the value of the rents, issues or profits of the said premises, or any part thereof, from the said nineteenth day of February, 1889, or from any time, or at all, is the sum of $1,000, or any other sum.

And the said C. M. Patterson further answering alleges: That he is a citizen of the United States and a resident of the Territory of Idaho. That on the seventh day of March, 1889, and for a long time prior thereto, the lot or piece of land situate being and lying in the town of Wallace, county of Shoshone and Territory of Idaho, known as and designated upon the plat of said town as lot No. 22 in block No. 22, being 25 feet wide and 100 feet long, and included in the land described in plaintiff's complaint, was public land of the United States, entirely vacant and unoccupied, and was not owned, held or occupied by any person or persons for any purpose whatsoever, and that while the same was so vacant and unoccupied, to wit: on the seventh day of March, 1889, he, the said C. M. Patterson, entered upon, located and appropriated said lot as a residence or town lot; that after entering thereon he placed a written notice of location thereon, describing the lot so located and appropriated, giving the name of the locator and the date of the location, and inclosed the same by an actual inclosure, consisting of a good and substantial board fence, and complied in all respects with the laws, and the customs, rules and regulations of the said town of Wallace and the inhabitants thereof, and caused the said notice of location to be filed and recorded in the office of the recorder of the said town of Wallace, and thereby became and was the owner (except as against the paramount title of the United States) and the rightful possessor of said lot or piece of land. That he, the said C. M. Patterson, has remained in the continuous quiet and peaceable possession of said lot since said date of location, and that he does not now claim, nor ever has claimed, or been in possession of any other part or portion of the land described in plaintiff's complaint herein.

Wherefore defendant prays judgment that his title and right of possession in and to said lot No. 22 in block No. 22 aforesaid be quieted and confirmed, and that he have judgment for costs.

FRANK GANAHL,
WALTER A. JONES,
Att'ys for Def't C. M. Patterson.

15 TERRITORY OF IDAHO, } ss:
Shoshone County, }

C. M. Patterson, being first duly sworn, says that he is one of the defendants in the above-entitled action, that he has heard read the foregoing answer, and knows the contents thereof, and that the same is true of his own knowledge.

C. M. PATTERSON.

Sworn to and subscribed before me this 5th day of June, A. D. 1889.

ANDREW B. GRACE,
Justice of the Peace in and for Shoshone County.

(Endorsed as follows:) No. 20. No. 502. Edwin D. Carter, pl'ff, *vs.* Charles Ruddy *et al.*, defendants. Answer of C. M. Patterson. Filed June 24, A. D. 1889. F. H. Grierson, clerk, by Barry N. Hillard, deputy. Service accepted by copy this 24th day of June, 1889. Wm. H. Claggett, pl'ff's att'y. Ganahl & Jones, attorneys for defendant. Filed April 7, 1891. A. L. Richardson, clerk.

In the District Court of the First Judicial District of Idaho Territory in and for Shoshone County.

EDWIN D. CARTER, Plaintiff,
vs.
CHARLES RUDDY, CHARLES ROBBINS, MICHAEL MCMURRAY, Frederick A. Stevens, M. J. Donnelly, C. M. Patterson, John Doe, and Richard Roe, Defendants.

Now comes Matthew J. Donnelly, one of the defendants, named in the complaint herein M. J. Donnelly, and for answer to the complaint denies:

1st. That on the 19th day of February, 1889, or at any time before or since said date, or at all, the plaintiff owned, or ever was seized or possessed or entitled to the possession at any time, or at all, of all or any part of that certain tract or parcel of land situated in the county of Shoshone and Territory of Idaho and described as follows, viz: The north half of block twenty-two (22) in the town of Wallace, in said county and Territory as said block is described on the plat of said town, said north half of said block twenty-two (22) being bounded on the north by Cedar street, on the west by Sixth street, on the east by Seventh street, and on the south by an alley. Said half block being 300 feet long in an east and west, and 100 feet wide in a north and south direction. (Except two separate lots, pieces or parcels of land described on the plat of said town as lots twelve (12) and twenty (20) in said block 22, each of said lots being 25 feet wide and 100 feet long.)

2d. Denies that on the 19th day of February, 1889, or at any other time, or at all, or while the plaintiff was the owner of, or seized or possessed or entitled to the possession of, said north half

of said block No. 20, without any right or title, he entered into the possession of the said premises or any part thereof, and ousted
16 or ejected plaintiff therefrom, and denies that he now unlawfully withholds, or ever has unlawfully withheld, the possession thereof or of any part thereof, from plaintiff, to the plaintiff's damage in the sum of $10,000, or in any other sum or at all.

3d. Denies that the value of the rents, issues or profits of the said premises, or any part thereof, from the said 19th day of February, 1889, or from any time, or at all, is the sum of $1,000 or any other sum.

And the said Matthew J. Donnelly further answering said complaint alleges that he is a citizen of the United States and a resident of Idaho Territory; that on the 23d day of February, 1889, and for a long time before said date, the two lots, pieces or parcels of land situate, being and lying in the town of Wallace, county of Shoshone and Territory of Idaho, known as and designated upon the plat of said town as lots Nos. 14 and 16 in block No. 22, each of said lots being 25 feet wide and 100 feet long, and included in the area of the land described in plaintiff's complaint, were public lands of the United States, entirely vacant and unoccupied, and were not owned, held, or occupied by any person or persons for any purpose whatsoever; and that while the same were so vacant and unoccupied, to wit, on the 23d day of February, 1889, he, the said Matthew J. Donnelly, entered upon, located and appropriated said lots as residence or town lots; that after entering thereon he placed a written notice of location thereon, describing the lots so located and appropriated, giving the name of the locator and the date of the location, and inclosed the same by an actual inclosure consisting of a good and substantial board fence, and complied in all respects with the laws and the customs, rules and regulations of the said town of Wallace, and the inhabitants thereof, and caused the said notice of location to be filed and recorded in the office of the recorder of said town of Wallace, and thereby became and was the owner (except as against the paramount title of the United States), and the rightful possessor of said lots or pieces of land; that he, the said Matthew J. Donnelly, has remained in the continuous quiet and peaceable possession of said lots since said date of location, and that he does not now claim, nor ever has claimed, or been in possession of any other part or portion of the land described in plaintiff's complaint herein.

Wherefore defendant prays judgment that his title and right of possession in and to said lots Nos. 14 and 16 in block No. 22 aforesaid be quieted and confirmed, and that he have judgment for costs.

TERRITORY OF IDAHO, } ss:
Shoshone County, }

Matthew J. Donnelly being first duly sworn says that he is one of the defendants in the above-entitled action, that he has heard read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge.

MATTHEW J. DONNELLY.

17 Sworn to and subscribed before me this 21st day of June, A. D. 1889.

A. E. ANGEL,
Justice of the Peace, Wallace Precinct.

(Endorsed as follows:) No. 20. No. 502. Edwin D. Carter, pl'ff, *vs.* Charles Ruddy *et al.*, defendants. Answer of Matthew J. Donnelly. Filed June 24, A. D. 1889. F. H. Grierson, clerk, by Barry N. Hillard, deputy. Services accepted by copy this 24th day of June, 1889. Wm. H. Claggett, pl'ff's att'y. Ganahl & Jones, attorneys for defendant. Filed April 7, 1891. A. L. Richardson, clerk.

In the Circuit Court of the United States in and for the District of Idaho.

EDWIN D. CARTER
vs.
CHARLES RUDDY, CHARLES ROBBINS, MICHAEL MCMURRAY, FREDERICK A. STEVENS, M. J. DONNELLY, C. M. PATTERSON, JOHN DOE, and RICHARD ROE.

We, the jury in the above-entitled cause, find for the defendants.

T. C. MAUPIN, *Foreman.*

(Indorsed as follows:) No. 30. Filed Dec. 11, 1891. A. L. Richardson, clerk.

In the Circuit Court of the United States in and for the District of Idaho.

EDWIN D. CARTER, Plaintiff,
vs.
CHARLES RUDDY, CHARLES ROBBINS, MICHAEL L. MCMURRAY, Frederick A. Stevens, M. J. Donnelly, C. M. Patterson, John Doe, and Richard Roe, Defendants.

The above-entitled action came on regularly for trial, on the 4th day of December, 1891.

The said parties appeared by their attorneys. A jury being regularly impaneled and sworn to try said action, and which trial thereupon proceeded regularly before said jury from day to day until the 11th day of December, 1891, during which time witnesses on the part of plaintiff and defendants were sworn and examined. After hearing the evidence, the argument of counsel and instructions of the court, the jury retired to consider of their verdict and subsequently returned into court, and being called answered to their names and say they find a verdict for the defendants, as

18 follows (entitling the cause):

"We, the jury in the above-entitled cause, find for the defendants.

"(Signed) T. C. MAUPIN, *Foreman.*"

Whereupon said verdict was then duly recorded by the clerk.

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered and adjudged that the said plaintiff, Edwin D. Carter, do not take anything by reason of his said complaint in this action against the said defendants or either of them; and it is hereby further ordered and adjudged by the court that the said defendants do have and recover of and from the said plaintiff, Edwin D. Carter, the costs and disbursements in this action taxed at $—— and that execution may issue therefor in favor of said defendants.

JAMES H. BEATTY, *Judge.*

Endorsed as follows: Circuit court of the United States in and for the district of Idaho. E. D. Carter, pl'ff, *vs.* Chas. Ruddy *et al.*, def'ts. Judgment.

In the Circuit Court of the United States for the District of Idaho.

EDWIN D. CARTER
vs.
CHARLES RUDDY *et al.*

I, the undersigned clerk of the circuit court of the United States, for the district of Idaho, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

[SEAL.] Attest my hand and the seal of said circuit court, this 16th day of December, 1891.

A. L. RICHARDSON, *Clerk.*

Endorsed: Filed December 16, 1891. A. L. Richardson, clerk.

In the Circuit Court of the United States for the District of Idaho.

EDWIN D. CARTER, Plaintiff,
vs.
CHARLES RUDDY *et al.*, Defendants.

Plaintiff's bill of exceptions to refusal of court to give special instructions to the jury asked for by plaintiff, and to charge of the of the court to the jury.

Be it remembered that on the 11th day of December, 1891, after the close of the evidence on the trial of this cause, and before the commencement of his argument to the jury, the plaintiff presented in writing to the court certain instructions numbered from 1 to 14 inclusive, and asked that each of the same be given by the court to the jury, which instructions are hereinafter set forth.

And be it further remembered that after the close of the arguments of the counsel for the respective parties to the jury, the court of its own motion charged and instructed the jury on matters of law as follows, to wit:

19 *Charge to the Jury.*

GENTLEMEN: I congratulate you that after listening patiently and carefully to this cause for a week, that it is about to end and the responsibility to be placed upon you to determine the case.

Now, in this case as in all cases, more or less testimony will creep in that may not be deemed by you as very important, and that may not be strictly relevant; and I desire by my instructions to eliminate as far as possible all unnecessary testimony, and direct your attention to the issues that you have to determine, and I will say to you now that while counsel in discussing a case before a jury must necessarily refer to what they deem to be the law, and the law they expect the court to give, yet it is your duty not to regard any law that counsel may have referred to, which is not in harmony with what the court will give. The court must take the responsibility of instructing you in the law, and if it does not give it correctly, as it is likely to err, as all courts are, the parties have relief by appeal and have the erroneous instructions which the court can give corrected by another court; so that you will therefore not be prejudiced in this case by any discussion of law that may have been made before you by counsel; that you will pay strict attention to the law I will give you, and base your action, after examining the facts in connection with the law, upon that.

Before I give instructions, I will call your attention particularly to the pleadings in this case.

The complaint alleges that plaintiff on the 19th of February was the owner, and was seized and possessed and entitled to the possession of a certain tract or parcel of land situated in the county of Shoshone, Territory of Idaho, described as follows, namely: The north half of block No. 22, in the town of Wallace, in said county and Territory, as said half block is described on the plat of said town; said north half of said block 22 being bounded on the north by Cedar street, on the west by Sixth street, and on the east by Seventh street, and on the south by an alley; the said half block being 300 feet long in an east and west, and 100 feet wide in a north and south direction. That while the plaintiff was the owner of, seized, possessed and entitled to the possession of said north half of said block 22 in said town of Wallace, as aforesaid, the defendants afterwards, remark that, the defendants afterwards, namely, on the 19th of February, 1889, and without right or title, entered into possession of the demanded premises and ousted and ejected plaintiff therefrom, and from the whole thereof, except a small parcel of the same designated on the map aforesaid as lots 12 and 20 in said block. And then the plaintiff prays judgment against the defendants for the possession of the demanded premises and for the sum of, etc., dollars.

To that the defendants have severally, each filing his own separate answer and denying generally the title and possession of the plaintiff to this property, and then each defendant sets up that on

the 19th of February, 1889, or about that time, that he found
20 this ground entirely unoccupied as public lands of the
United States, and that he entered into the possession by reason of the fact that he found it unoccupied, and that he has since claimed and held possession under his entry.

That is what the pleadings state. I will refer to the pleadings further on in another portion of the instructions.

Now, by the testimony in the case you have observed that the plaintiff for his title to the possession of the disputed lots relies, first, upon an entry made in the land office at Cœur d'Alene City of this said and adjoining land by W. R. Wallace, as agent for one Walter Bourke with Sioux half-breed script, and a deed from the said Bourke by Wallace; and second upon his possession and improvements of the premises.

While the defendants claim plaintiff obtained no title whatever through his deed which was based upon the entry made upon said script, and that plaintiff did not have, on February 19, 1889, any such possession of the premises as the law required or as justified him in holding them, but that on said date the ground was vacant public land and not occupied by plaintiff or any one, and while so situated the defendants in good faith entered into the possession and have since held the same.

This is in law termed an action of ejectment. In such an action the plaintiff must rely upon the strength of his own title and not upon the weakness of his adversary's claim, and the burden of proof is on the plaintiff to show by a preponderance of evidence the superiority of his claim, and should he fail to show this the defendant would be entitled to continue in the possession.

Possession is always a *prima facie* evidence of title, and a party in possession cannot be deprived of it by any one but the rightful owner or some one with a better right of possession.

It is admitted that defendants entered into possession of the premises on or about the 19th day of February, 1889, and that they were still in such possession when this action was commenced, on the 12th day of April, 1889. The plaintiff must show he had a superior right over the defendants to the possession of the premises, either by showing he had a title or by showing his possession prior to and at the time — defendants' entry.

For the purpose of establishing a legal title the plaintiff introduced in evidence a certificate of entry in the land office at Cœur d'Alene City, of the entry of 80 acres, including the ground in controversy, such entry having been made, or so claimed, by one Wallace as the agent of one Bourke, and upon what is known as Sioux half-breed script, and this is followed by a deed to plaintiff from said Wallace, as such agent for said Bourke, to the ground. But I now instruct you in an action like this, in the U. S. courts, such certificate issued by a land office of an entry of land cannot be received
as any evidence of legal title, and the deed referred to being
21 based upon such entry cannot be considered as evidence of a
legal title or of a title in fee, and as evidence of such title you will entirely disregard them, and that the only consideration

you can give to either said certificate of entry or said deed is as evidence to explain plaintiff's original entry upon the premises, to explain his claim to the possession thereof, and to show his good faith in the claim he asserts.

Evidence has been introduced by defendants to show that this Sioux script has been canceled and that all entries made under it, including the premises in dispute, are void. But this cannot affect the certificate of entry or the deed as evidence of plaintiff's good faith or as evidence for the purpose above stated, unless it also appears to you from the evidence that the plaintiff knew when he accepted such deed of the invalidity of the Sioux script, and the entry thereunder.

The defendants do not show or claim any title in fee to the premises, and the plaintiff having failed to show any, it follows, so far as the evidence in this case advises us, that the real title still remains in the Government of the United States. It then results that there is but one question left for your determination, to wit: had the plaintiff at the time defendants entered upon this ground, on the 19th day of February, 1889, such possession, and was he then exercising such control and ownership and possession over the premises as gave him a superior right to its possession over that which the defendant took. If he was then in the lawful possession of it, the defendant had no right to enter upon it, and cannot hold the possession they took. If plaintiff was not then in the lawful possession, the defendants had the right to enter and can remain therein.

It appears therefore that the title to the premises was, at the time referred to in this action, and appears still to be, in the Government of the United States. All possessory rights and all titles to be procured for the public lands of the United States must be regulated and controlled by the laws of the United States, and in consideration of any question relating to such land we must keep in view the policy and the general rules and laws of the Government and the decisions of its courts thereunder applicable to its lands and their disposal, and any law of this State providing any way for the the disposal or occupation of such public lands, which is not in harmony with such United States laws and decisions of the United States courts, must be disregarded.

The Government has pointed out specific modes by which titles to its lands can be procured,—by pre-emption, homestead and otherwise. It has also a statute providing for the entry of lands for town-site purposes, and, in addition to all these specific laws, it does permit as a part of its policy, without any written law, persons to go upon its public lands when not reserved and hold the possession thereof, without title as against all other persons having no better title or right.

22 While it appears in this case that the tract of land in controversy, including that in dispute, was, in June, 1886, platted and surveyed as a town site, and that plaintiff took his deed for a block of ground as so platted, it does not appear that such platting of such town was made in pursuance of the general town-site act, or of any law or statute, and the plaintiff's rights are not measured

by such town-site act, but his rights depend upon such right of possession which the Government permits its citizens to take and hold to its public lands until superseded by such better title. The defendants are proceeding, as we understand, to procure title under the town-site law referred to, and while under this law a perfect title may be procured, it does not authorize parties to organize into a town, lots in the lawful possession of some other person, without his consent. If, therefore, plaintiff was at the time alleged, February 19, 1889, in the lawful possession of the land, any attempt to organize it into a town under such act cannot operate to deprive him of such lawful possession.

The seventh instruction: What, then, is the possession plaintiff must have had to entitle him to recover? It will be seen from plaintiff's complaint that he does not treat the premises sued for as distinct lots or parcels of land, but he alleges his possession to the north half of block 22 and describes it all as one tract bounded by certain boundary lines, and that, while he was in possession of all this tract, on said 19th day of February, the defendants afterwards on that day ejected him from all of it except a small parcel thereof, designated on the plat as lots 12 and 20, and the plaintiff claims he held and treated it all as one tract, and that it was not marked off on the ground by any monuments into separate and distinct tracts or lots. Also plaintiff claims that upon this ground,—this north half of the block,—he had a tenant in one part of it. The defendants claim this half block was not only platted into separate and distinct lots, but it was so surveyed and marked on the ground.

It is the law that where a party holds a tract of land as a separate and distinct tract and as one tract under a claim of title, as the boundaries of the tract are so designated, described and marked that they may be known, his possession, either by himself or tenants, of a part of the tract operates as possession of all.

If in this case you find that this half block was held by plaintiff as one tract or parcel of land, and that it was so marked out or designated in any way that defendants could know its location and plaintiff had possession of any part of it, such possession extended to and gave him possession of the entire tract; but if, on the contrary, it was cut up into separate and distinct lots and so marked upon the ground and treated as distinct tracts, then he must show the possession of all thereof.

Eighth instruction: Neither the Government nor its courts have established any absolute, unbending rule applicable alike to all lands requiring certain specific inclosures, improvements or resi-
23 dence thereon, to establish a possessory right thereto; but the kind of an inclosure or improvement or residence depends largely upon the nature of the land and the use to which it is devoted. If the land is for agricultural purposes, it must be fenced; if for supplying timber, it need not be, or, as in one case once before the Supreme Court of the United States, if it is a town lot used only for the digging of sand therefrom, it need not be inclosed or otherwise improved. So far as inclosurers are required by law for town lots, it is for the purpose of giving notice that some one claims the

premises. Any other improvements or objects placed upon the ground, or any other acts done concerning it which will operate to give such notice to the world, will, under the law which governs us, be equivalent to such inclosure, but in all cases the improvements on the land, or acts done concerning it, must be of such a nature as to clearly give to the world such notice of claim and possession.

It is a part of the policy of the Government to require as a condition to the alienation of its lots that they shall be improved and occupied for some beneficial purpose, and while it does not declare the use to which they shall be devoted, it does not design that its citizens shall hold its land by a simply possessory title without improvement or in an uncultivated state for speculation, but where such lands are held, the holder must show by his acts it is for some useful purpose and with a view of developing and improving it. If it is for a mining claim, he must work it; if a pre-emption claim, he must improve it; if a timber claim, he must plant it; and if a desert entry, he must water it. And in the case of any kind of property the Government requires that such reasonable improvements shall be made as will fit it for the use to which it was to be appropriated, and show the good faith of the claimant; but it does not require a hardship or that such improvements shall be made of such a character or made in such time as to make his possession onerous or burdensome.

It is not necessary that a claimant must be in the constant actual possession of the ground—that is, to be upon it in person or by an agent, but he may have a constructive possession of it by exercising such acts of ownership over it as to clearly indicate his claim to, and possession of it, but these acts must be so continuous, notorious, and public as to operate as a constant notice to the world of his claim.

In this case it is the question for you to investigate whether the acts done by the plaintiff, his improvements made on, or the possession he had to, such ground, were — as would fairly notify the defendants of his claim and possession.

The next question is, what are the acts of ownership and possession to which your attention must be directed? As acts of ownership and possession the plaintiff claims he entered upon the premises in good faith in pursuance of his deed; that he thereupon proceeded to clear the land of its timber and to prepare it for occupation; that he put sidewalks along the sides of a portion of it; that
24 he put them there, as the owner of the ground, for its convenient use and to improve and enhance its value; that as such owner and claimant he caused water to be conducted to some part of the premises; that he paid taxes on the premises, and that he has always, since purchasing the ground, claimed to own it, and has openly and publicly exercised control over it.

If these assertions of plaintiff are true, and that these acts were done by him or by his agents, you are instructed that they constituted in him such a possessory title to the premises in dispute as the government will protect, and as against any other person claiming by a similar or subsequent possessory title.

On the contrary, the defendants claim that the plaintiff's entry on the land was not in good faith to hold it; that his object was to

cut therefrom, for building purposes, the timber thereon; that he did not clear the land; that the sidewalks were not constructed for the benefit of the property, or because plaintiff owned it, but to benefit and add to the convenient use of other property he owned, and business he was operating in that vicinity; that the water he had conducted there was not to benefit the premises, but was a part of the town system of water works, and that the plaintiff had, through himself or his agents, ceased to exercise control over the property, and that on the 19th day of February, 1889, it was vacent, unoccupied lands of the United States, and that on such day they peaceably entered the premises.

If you find the claims of the defendant- to be true, then their entry and possession was lawful.

Now, gentlemen, you will mark that I have attempted to state the claims of the two parties, and the evidence which they rely upon. I have tried to keep from you any view that I may entertain as to the weight of the evidence, and I will ask you now, in taking the case, that you will disregard anything but the real rights of these parties. Much has been said here about the good or bad faith with which these parties have entered, and the possession and standing of the plaintiff, and perhaps some things have been said that might tend to prejudice you. I want to say to you that you are in the position of a court. It is your duty to disregard everything that tends to prejudice your judgment in the least, and to listen only or take only under your consideration the law applicable to the case and the evidence, to determine between these two parties according to the law and the evidence that has been placed before you. The duty resting upon you is as solemn as the one resting on the court. The court has attempted, to the best of its ability, to allow it to be placed before you that which is fair and just to both parties, and what you are entitled to hear and know. It is your duty to give these parties a fair and impartial hearing, and try to reach a just conclusion in the case.

As you are aware, it is a matter involving a good deal — of considerable importance, and the case has required a good deal of time, and has put the parties to an immense amount of ex-
25 pense, and it is your duty to consider it in all particulars, and try to reach a just conclusion in the matter.

As to your verdict, after looking over all the evidence in the case, either the plaintiff is entitled to a judgment against the defendant-, or else all of the defendants are entitled to a judgment against the plaintiff. In other words, either the plaintiff is entitled to the possession of the ground in controversy here, or the defendants are, and I do not deem it necessary, as counsel has requested, to require you to find separate or special verdicts. In fact, I think to give an instruction of that kind would only confuse you, and put the case in a worse condition; therefore your verdict will be either for the plaintiff or for the defendants, and upon such a verdict as that the court will be able to render a judgment which will be proper in the case. The body of the verdict is this: "We, the jury in the above-entitled cause, find for the ——," either plaintiff or defendant-,

as you conclude, and the foreman whom you select will sign that verdict.

And that no other charge or instructions were given by the court to the jury, and the court refused to give to the jury each and all of said instructions asked for by the plaintiff.

And be it further remembered that at the conclusion of the said charge of the court to the jury, and before the jury left the box, the plaintiff handed to the court, in writing, the following exceptions to the charge of the court, and to the court's refusal to give instructions asked by plaintiff, viz:

The plaintiff excepted to that portion of the charge of the court to the jury, in words as follows:

"But I now instruct you that in an action like this in the United States courts, such certificate issued by a land office of an entry of land cannot be received as any evidence of legal title, and the deed referred to being based upon such entry cannot be considered as evidence of a legal title, or of a title in fee, and as evidence of such title you will entirely disregard them, and that the only consideration you can give to either said certificate of entry, or said deed, is as evidence to explain plaintiff's original entry upon the premises; to explain his claim to the possession thereof, and to show his good faith in the claim he asserts."

Plaintiff also excepts to that part of the charge of the court after the words, "The defendants do not show or claim any title in fee to the premises," and before the words "it follows," said part so excepted to being as follows: "And the plaintiff having failed to show any."

The plaintiff also excepts to the following portion of the charge of the court, to wit:

"It appears, therefore, that the title to the premises was at the time referred to in this action, and appears still to be, in the Government of the United States."

The plaintiff also excepts to the following portion of the charge of the court, to wit:

"But if, on the contrary, it was cut up into separate and
26 distinct lots and so marked upon the ground, and was held and treated as distinct tracts, then he must show the possession of all thereof."

Plaintiff also excepts to all that part of the charge of the court in words as follows, to wit:

"It is a part of the policy of the Government to require as a condition to the alienation of its lots that they shall be improved and occupied for some beneficial purpose, and while it does not declare the use to which they shall be devoted, it does not design that citizens shall hold its land by simply possessory title without improvements or in an uncultivated state for speculation, but where such lands are held the holder must show by his acts it is for some useful purpose, and with a view of developing and improving. If it is for a mining claim, he must work it; if a pre-emption claim, he must improve it; if a timber claim, he must plant it, and if a desert entry, he must water it, and in the case of any kind of property the Gov-

ernment requires that such reasonable improvements shall be made as will fit it for the use to which it was to be appropriated, and show the good faith of the claimant; but it does not require a hardship or that such improvements shall be of such a character or made in such time as to make his possession onerous or burdensome."

Plaintiff also excepts to all that portion of the charge of the court in words as follows:

"I will ask you now, in taking the case, that you will disregard anything but the real rights of these parties. Much has been said here about the good or bad faith with which these parties have entered and the possession and standing of the plaintiff, and perhaps some things have been said that might tend to prejudice you. I want to say to you that you are in the position of a court; it is your duty to disregard everything that tends to prejudice your judgment in the least, and to listen only, or take only under your consideration, the law applicable to the case and the evidence, to determine between these two parties according to the law and the evidence that has been placed before you."

Plaintiff also excepts to the refusal of the court to give to the jury the first instruction asked by plaintiff, which instruction is as follows:

"The plaintiff has introduced evidence showing that, prior to the entry of defendants upon the north half of block 22, the plaintiff had erected two houses on the said north half of said block, and that at the time of the entry of the defendants the plaintiff was in the actual possession of at least one of these houses, by his tenant, and such possession is the actual possession of all the said north half of said block 22, and your verdict must be for the plaintiff."

Plaintiff also excepts to the refusal of the court to give the second instruction asked for by the plaintiff, which instruction is as follows:

"The jury are instructed that if they believe that plaintiff had erected two houses on the north half of block 22 prior to the
27 entry of the defendants, and at the time of such entry by defendants was in the actual occupancy of either of said houses, by himself or his tenant, then the plaintiff is entitled to recover."

Plaintiff also excepts to the refusal of the court to give the third instruction asked for by plaintiff, which instruction is as follows:

"In determining the question of whether the plaintiff had possession of the premises in controversy at the time of the entry of the defendants, I instruct you that it is not necessary that the land be inclosed with a fence, or that the plaintiff actually reside upon it, or that he remain upon the land, or even that he keep an agent or tenant constantly upon the land, and, if you find from the evidence that the plaintiff entered upon the north half of block 22, in the town of Wallace, which includes the premises in controversy, claiming the whole thereof, and that the boundaries thereof were distinctly marked upon the ground, and were well known, and that he exercised acts of ownership over the same, by clearing off the timber, and by the construction of two houses thereon, and by

building sidewalks, and that same were done for the purpose of improving the same, and that he paid the taxes thereon, and that these acts of plaintiff were open and notorious, then I instruct you that such acts would constitute possession by the plaintiff of the whole of the north half of the block.

"And I further instruct you that such possession of the plaintiff would give him, plaintiff, title, upon which he may recover against the defendants."

Plaintiff also excepts to the refusal of the court to give the fourth instruction asked for by the plaintiff, which instruction is as follows:

"If the jury find from the evidence that the plaintiff was in the possession of the premises in controversy within the meaning of the terms as I have defined them, at a time prior to the entry of the defendants, then I instruct you that such possession is presumed to continue until entry thereon by the defendants, and the burden is upon the defendants to show that plaintiff had abandoned his possession to the ground in controversy at the time they entered, and in determining the question of abandonment you may consider the payment of taxes on the land by the plaintiff as well as all his other acts relating to the premises."

Plaintiff also excepts to the refusal of the court to give the fifth instruction asked for by plaintiff, which instruction is as follows:

"In determining the question of whether the plaintiff entered into possession of the whole north half of the block 22, the jury are to consider the deed given in evidence as well as the subsequent payment of taxes upon the land by the plaintiff."

Plaintiff also excepts to the refusal of the court to give the sixth instruction asked for by plaintiff, which instruction is as follows:

"The jury are instructed that in determining the question of whether the plaintiff was in possession of the premises in con-
28 troversy at the time of the entry by the defendants, it is not necessary that the plaintiff should have been an inhabitant or actual resident of the town of Wallace, or that he actually resided upon the premises in controversy, or any part thereof, or that the premises be inclosed with a fence, or that there should be a building upon any of the lots in controversy."

Plaintiff also excepts to the refusal of the court to give the seventh instruction asked for by the plaintiff, which instruction is as follows:

"The jury are instructed that if the plaintiff entered upon the premises in controversy under a deed from Walter Bourke, introduced in evidence, claiming title to all of block 22, in good faith under said deed, and erected buildings or made other improvements upon a portion of said block, and that the said premises were not in the adverse possession of any one at the time he so entered, and that under his said claim of ownership under said deed he cleared the whole or a portion of said block, then I instruct you that his possession of a part of the premises described in said deed would be a possession of the whole block, including the ground in controversy. And if you find that the plaintiff did not subsequently abandon

said premises, but still continued to claim the same and exercise acts of dominion and control over the same, claiming under said deed, then I instruct you that the defendants could not obtain any rights in the premises by an entry thereon; that such possessions of the plaintiff would give him the title to the premises as against the defendants."

Plaintiff also excepts to the refusal of the court to give the eighth instruction asked for by plaintiff, which instruction is as follows:

"Possession may be evidenced in several ways: First. By an actual residence upon the property, or by an inclosure, or by making improvements thereon, or by cultivating the same, or by any other acts that are open and notorious that show that he exercised a dominion and control over the same, and that among such acts may be enumerated the cutting of timber and clearing of the land, and the payment of taxes thereon."

Plaintiff also excepts to the refusal of the court to give the ninth instruction asked for by plaintiff, which instruction is as follows:

"If you believe from the evidence that the plaintiff entered upon and took possession of block 22 in the town of Wallace under and by virtue of the deed from Walter Bourke, introduced in evidence; that he immediately went upon, occupied and improved and continued to occupy the said block of land, and asserted his claim and possession to the whole of said block, under said deed, and no other person was in adverse possession of any portion thereof, up to the time when the defendants entered thereon, and never abandoned the same, and that the premises in controversy in this suit are within the boundaries of said block 22, you will find for the plaintiff."

Plaintiff also excepts to the refusal of the court to give to
29 the jury the tenth instruction asked for by plaintiff, which instruction is as follows:

"The jury are instructed that a fence, building or other improvement is not essential to plaintiff's right to recover if plaintiff show acts of ownership, under claim of right, visible and notorious. Such acts are sufficient to authorize the jury to find such possession."

Plaintiff also excepts to the refusal of the court to give to the jury the eleventh instruction asked for by plaintiff, which instruction is as follows:

"The jury are instructed that the uninterrupted payment of taxes on the land is powerful evidence of a claim of right to it."

Plaintiff also excepts to the refusal of the court to give to the jury the twelfth instruction asked for by plaintiff, which instruction is as follows:

"The jury are instructed that neither actual occupation, cultivation or residence are necessary to constitute actual possession."

Plaintiff also excepts to the refusal of the court to give to the jury the thirteenth instruction asked for by plaintiff, which instruction is as follows:

"Mere possession is a good title against a stranger having no title; a mere intruder cannot enter upon a person seized, eject him, and

when sued question on his title or set up any outstanding title in another. The prior peaceable possession of the plaintiff is enough to enable him to recover in ejectment against one having no title."

Plaintiff also excepts to the refusal of the court to give the fourteenth instruction asked for by plaintiff, which instruction is as follows:

"The invalidity of plaintiff's grant is not a defense of which the defendant can take advantage in this case; if the plaintiff had reduced this property in dispute to his dominion and control, paid taxes thereon, cleared the trees therefrom, put sidewalk- along the west side, along the greater part of the north side, and a part of the south side thereof, and the same was marked upon the ground by stakes set at the corners of the lots in question, and at the corners of the block, marking the streets and alleys, at the time of the entry of the defendants, then you should find that the plaintiff was in possession of the ground in controversy, and the entry of defendants was unlawful."

Wherefore, to the end that the errors in law, if any, committed by the court in its charge to the jury, and in its refusal to charge as requested by the plaintiff, may appear, this, the plaintiff's bill of exceptions to the charge of the court to the jury, and for the refusal of the court to charge the jury, is allowed, signed and sealed, and made a record in the cause.

By the court:

JAS. H. BEATTY.

Dated this 16th day of December, 1891.

(Endorsed as follows:) No. 20. U. S. circuit court, district of Idaho. Edwin D. Carter *vs.* Charles Ruddy *et al.* Bill of
30 exceptions to charge of court and to refusal to charge. Filed Dec. 11, 1891. A. L. Richardson, clerk.

In the United States Circuit Court for the District of Idaho.

E. D. CARTER, Plaintiff,
vs.
CHARLES RUDDY *et al.*, Defendants.

Now comes the plaintiff in the above-entitled cause, and moves the court that judgment be entered in favor of the plaintiff against the defendants, notwithstanding the verdict of the jury rendered herein, and for grounds of motion allege—

First. That the undisputed evidence in the cause showed that the plaintiff entered and was in possession under and by virtue of a warranty deed from one Walter Bourke, and continued to have such possession under such deed up to the time of the entry of the defendants, and that said deed described and conveyed the premises in controversy, and plaintiff was shown to be in the actual possession, by his tenant, of the premises so conveyed and described, at the time of the entry of the defendants.

Second. That the question of possession where a party is shown to have been in possession under a warranty deed, is a question of law for the court, and not a question of fact for the jury in this case.

Third. That the plaintiff being shown to be in possession under a warranty deed of a part of the premises described in said deed at the time of the entry of this defendant, this fact not being denied, the court should not leave the question of possession to the jury, the extent of such possession being a matter of law for the court.

McBRIDE & ALLEN,
WOODS & HEYBURN,
Attorneys for Plaintiff.

(Endorsed as follows:) No. 20. In the U. S. circuit court for Idaho. Edwin D. Carter *vs.* Charles Ruddy *et al.* Motion for judgment by plaintiff. Filed Dec. 12, 1891. A. L. Richardson, clerk.

United States Circuit Court for the District of Idaho.

E. D. CARTER, Plaintiff,
vs.
CHARLES RUDDY *et al.*, Defendants.

It is hereby stipulated by and between the parties, plaintiff and defendant, by their respective attorneys, that the plaintiff's bill of exceptions in this case shall be settled before the above-entitled court, or the judge thereof, at Boisé City, Idaho, on the second Monday of March, 1892.

McBRIDE & ALLEN,
WOODS & HEYBURN,
Attorneys for Plaintiff.
F. GANAHL,
A. HAGAN,
L. VINEYARD AND
W. A. JONES,
Attorneys for Defendants.

31 (Endorsed as follows:) No. 20. U. S. circuit court, dist. Idaho. E. D. Carter *vs.* Chas. Ruddy *et al.* Stipulation. Filed Feb. 18, 1892. A. L. Richardson, clerk.

Order Denying Plaintiff's Motion for Judgment.

At a stated term of the circuit court of the United States of America, for the district of Idaho, held at the court-room in Boisé City, Idaho, on the 16th day of December, 1891.

Present: The Hon. Jas. H. Beatty, judge.

EDWIN D. CARTER
vs.
CHARLES RUDDY *et al.* } No. 20.

On this day was announced the decision of the court on plaintiff's motion that judgment be entered for plaintiff, notwithstanding the verdict, heretofore argued and submitted. Ordered that said motion for judgment be, and the same is hereby denied, and ordered that judgment be entered herein in accordance with the verdict.

Order Extending Time to File Bill of Exceptions.

At a stated term of the circuit court of the United States of America, for the district of Idaho, held at the court-room in Boisé City, Idaho, on the 13th day of January, 1892.

Present: The Hon. Jas. H. Beatty, judge.

EDWIN D. CARTER
vs.
CHARLES RUDDY *et al.* } No. 20.

In accordance with stipulation in this cause this day filed, ordered that the plaintiff have until and including the 25th day of January, 1892, in which to draw up, serve and file his proper bill of exceptions therein, and that in the meantime all proceedings in said cause be stayed.

Order Extending Time to Serve Amendments.

At a stated term of the circuit court of the United States of America, for the district of Idaho, held at the court-room in Boisé City, Idaho, on the 2d day of February, 1892.

Present: The Hon. Jas. H. Beatty, judge.

EDWIN D. CARTER
vs.
CHARLES RUDDY *et al.* } No. 20.

On motion of defendants' attorney, ordered that defendant- have ten days in addition to the five days fixed by law, in which to prepare and serve amendments to plaintiff's proposed bill of exceptions.

32 *Order Extending Time to Serve Amendments.*

At a stated term of the circuit court of the United States of America, for the district of Idaho, held at the court-room in Boisé City, Idaho, on the 9th day of February, 1892.

Present: The Hon. Jas. H. Beatty, judge.

EDWIN D. CARTER
vs.
CHARLES RUDDY *et al.* } No. 20.

By agreement of counsel, ordered that defendants have until the first Monday in March next, to prepare, serve and file amendments to plaintiff's proposed bill of exceptions.

Order Denying Motion for New Trial.

At a stated term of the circuit court of the United States of America, for the district of Idaho, held at the court-room in Boisé City, Idaho, on the 14th day of March, 1892.

Present: The Hon. Jas. H. Beatty, judge.

EDWIN D. CARTER
vs.
CHARLES RUDDY *et al.* } No. 20.

Now comes the parties herein, by their respective attorneys of record, and thereupon plaintiff's motion for a new trial came on to be heard, and was submitted to the court without argument, and the court being fully advised in the premises ordered the said motion for a new trial be, and the same is hereby denied.

To which ruling the plaintiff, by his counsel, then and there excepted in due form of law.

In the Circuit Court of the United States for the District of Idaho.

EDWIN D. CARTER, Plaintiff,
vs.
CHARLES RUDDY *et als.*, Defendants. }

To F. Ganahl, A. Hagan, W. A. Jones, and L. Vineyard, attorneys for the defendants in the above-entitled cause:

Please take notice that the annexed is a copy of the bill of exceptions prepared and this day filed with the clerk of the above court, in the above-entitled cause.

Yours, &c.,

WOODS & HEYBURN,
McBRIDE & ALLEN,
Attorneys for the Plaintiff.

Dated this 30th day of January, 1892.

33 In the Circuit Court of the United States for the District of Idaho.

EDWIN D. CARTER, Plaintiff,
vs.
CHARLES RUDDY, CHARLES ROBBINS, MICHAEL McMURRAY, Frederick A. Stevens, M. J. Donnelly, C. M. Patterson, John Doe, and Richard Roe, Defendants.
} Bill of Exceptions.

Be it remembered, that on the — day of December, A. D. 1891, the issues in this action came on for trial in open court before the Hon. Jas. H. Beatty, judge of the above court, Messrs. W. B. Heyburn and Albert Allen appearing as attorneys for the plaintiff, and F. Ganahl, Walter A. Jones, A. Hagan and Lycergus Vineyard appearing as attorneys for the defendants. Whereupon the following proceedings were had:

A jury was duly empaneled, charged and sworn to try the cause, whereupon the following witnesses were sworn, examined on behalf of the plaintiff, and the following testimony was introduced, and objections made and exceptions taken, as follows, to wit:

EDWIN D. CARTER, being called and sworn in his own behalf, testified as follows:

I am the plaintiff in this action. I reside at Wallace, Idaho. My family and my home are in Wisconsin. I am a citizen of the United States. I am acquainted with the premises in controversy—first became acquainted with them the last of June or the 1st of July, 1886. At that time Colonel Wallace had possession of 80 acres of land, which included this block of land. At that time there were two or three log houses on the 80 acres, and a fence running partly around it; the timber was so thick I could not see. Mr. Wallace claimed to be representing Walter Bourke; claimed that he entered the ground with a piece of Sioux half-breed script; at this time the fence partly around the south side and some on the east, and the corner stakes, marked the boundaries of the 80 acres. This 80-acre tract was generally known as the Black forest, situated on the old Mullan wagon road leading from Walla Walla to Helena; it was densely covered with timber, cedar timber, the greater portion of it; there was a small portion of the western part of the 80 where the timber was not quite so thick, and more or less low ground on it. It was one of the most dense cedar forests I have ever seen; I have lumbered a good many years, but never saw as much timber on the same amount of ground, considering down timber and standing. At the time I went there, Wallace told me what lumber they had they were cutting with a whip-saw, and that lumber was selling at $60 a thousand; there was no store or anything but three or four log buildings there to my knowledge. He proposed to me that if I would come in and bring a saw-mill and stock of goods, he would sell me this block 22 for $600. I asked him about the timber that I should manufacture at the mill, and he said he would sell me the

timber on the entire 80 for a dollar a thousand. The logs
34 were to be scaled at the mill as delivered, and I was to pay
him for the timber, aside from purchasing the block of land. At that time Mr. Wallace showed me what they called the land-office receipt. (Paper marked "Exhibit A" shown witness.) I saw that paper in June, when I was there. It is the paper Mr. Wallace showed me relating to the title to this 80-acre tract.

Paper marked "Exhibit A" is offered and received in evidence and read to the jury, and is as follows, to wit:

EXHIBIT "A."

Duplicate. Register and receiver.
Script certificate.
Sioux half-breed reserve, at Lake Pepin. (Act of July 17, 1854.)

UNITED STATES LAND OFFICE,
CŒUR D'ALENE, *June* 5, 1886.

We hereby certify that the attached half-breed script No. 430, letter C, was on this day received at this office from Walter Bourke by W. R. Wallace, attorney of —— county, State of Minnesota.

ROBERT E. McFARLAND, *Register.*
JAMES F. LEGATE, *Receiver.*

I, Walter Bourke, —— county, State of Minnesota, hereby apply to locate, and do locate, the tract of land as designated by the plats of the Government survey, to wit: unsurveyed land in the valley of south fork of Cœur d'Alene river, as designated by plat and field-notes herewith inclosed, and containing eighty acres in the district of lands subject to sale at the land office of Cœur d'Alene, in satisfaction of the attached script No. 430, letter C, issued under the act of July 17th, 1854.

Witness my hand and seal this 5th day of June, 1886.

ROBERT E. McFARLAND, *Register.*
JAMES F. LEGATE, *Receiver.*
WALTER BOURKE,
By his att'y, W. R. WALLACE.

UNITED STATES LAND OFFICE,
CŒUR D'ALENE, *June 5th*, 1886.

We hereby certify that the annexed script No. 430, letter C, has this day been located on the tract of land described within, containing eighty acres, agreeable to act of July 17th, 1854, and by the party duly authorized to make such location.

ROBERT E. McFARLAND, *Register.*
JAMES F. LEGATE, *Receiver.*

Indorsed: 2757. Register's and receiver's script certificate. U. S. land office. W. R. Wallace. Filed for record in the office of the county recorder of Shoshone county, Idaho Territory, June 15, 1886,
35 at 4 o'clock p. m. Recorded in Book H, Miscellaneous Records, at page 113, at request of W. R. Wallace. Thos. E. McLelland, county recorder, by M. J. Sweeney, deputy.

Field-notes of survey of the claim of W. R. Wallace in Placer Center mining district, Shoshone county, Idaho Ter., as officially surveyed for U. S. patent by Geo. R. Trask, U. S. deputy mineral surveyor; surveyed May 30 and 31st, 1886.

Beginning at a post 6 in. square, 7 feet long, set 3 feet deep, marked cor. No. 1, W. R. Wallace U. S. Lot with mound of earth and rocks 2½ ft. high about the same. This cor. (No. 1) being situated on a steep hillside facing north about 150 feet nearly due south from the junction of Placer creek with the South fork of the Cœur d'Alene river, and about 1,500 feet nearly due west from the confluence of Nine-mile creek with said South fork of the Cœur d'Alene river, and about 250 feet south of the improved graded portion of the old Mullan wagon road; thence I run true courses as follows, to wit: East var. 21 degrees, 35 minutes E. 110 ft. Placer creek, 20 ft. wide, flows N. W. 1,430 ft. to old Mullan wagon road, N. W. & S. E. 1,560 to left bank of South fork of the Cœur d'Alene 30 ft. wide, flows N. W. 1,590 foot of hill, ascend 1,640, set a post 6 in. square, 7 ft. long, 3 ft. deep, with mound of earth and rocks 2½ feet high about the same. Post marked cor. No. 2, W. R. Wallace, U. S. Lot from which a black pine 6 in. in diameter bears N. 70 degrees 30 minutes W. 17 ft. dist. marked cor. No. 2, U. S. Lot Wallace B. T. black pine 6 in. dia., bears N. 86 degrees 35 minutes E. 37 ft. dist. marked cor. No. 2, U. S. Lot Wallace B. T. tamarack 8 in. dia. bears south 47 degrees W. 72 feet dist. marked cor. 2 U. S. Lot Wallace B. T. Thence I run on east end line south var. 21 degrees 35 minutes, descend 930 ft. of hill right bank of South fork Cœur d'Alene river 30 ft. wide flows N. W. 1,030 ft. to right bank of branch of said South fork 25 ft. wide flows N. W. 1,280 ft. to graded portion of old Mullan road E. & W. 1,320 ft., set a post 6 in. square, 7 ft. long, 3 ft. in ground, with mound of earth and rocks about same. Post marked cor. No. 3, W. R. Wallace, U. S. Lot from which a tamarack tree 16 in. dia. bears N. 71 degrees W. 53 ft. dist. marked cor. No. 3, Wallace, U. S. Lot B. T. No other tree within limits.

Thence I run on south side line west var. 21 degrees 35 minutes east 2,640 ft., set a post 6 in. square, 7 ft. long, 3 ft. in ground, with mound of earth and rocks 2½ ft. high about same, marked cor. No. 4, W. R. Wallace, U. S. Lot from which a cedar tree 12 in. dia. bears S. 87 degrees W. 46 feet dist. marked cor. No. 4, Wallace, U. S. Lot B. T. A balsam tree 12 in. dia. bears N. 10 degrees E. 73 ft. dist. marked cor. No. 4, Wallace, U. S. Lot Wallace house bears N. 42 degrees 28 minutes east about 1,030 ft. dist. Thence along west end line of claim 400 ft. to right bank of Placer creek north var. 21 degrees 35 minutes east, creek 20 ft. wide flows N. E. 440 ft., leave creek and ascend steep hillside 1,150 ft. top of hill and de-
36 scend 1,320 ft. to cor. No. 1, the place of beginning of survey of this claim, comprising an area of (80) eighty acres. This claim is situated in north latitude 47 degrees 28 minutes, and long. about 116 degrees west, in Placer Center mining district, Shoshone county, Territory of Idaho, on the old Mullan wagon road between Fort

Benton in Dakota and Fort Walla Walla in Washington Ter. on the South fork of the Cœur d'Alene river at the confluence of Placer creek and Nine-mile creek with said South fork, about a quarter mile below or down the river from the mouth of Canyon creek, about 27 miles up the river from the old Cœur d'Alene mission at the head of Lake Cœur d'Alene.

GEO. R. TRASK,
U. S. Dep'y Min. Sur.

I hereby certify that the foregoing is a true and correct copy of the field-notes filed in this office by W. R. Wallace for a plat of land upon which said Wallace, as attorney for Walter Bourke, a half-breed Sioux Indian, has located said Bourke's script for eighty acres of land in pursuance of an act of Congress. To make this correct copy, the words "about the same" were interlined in the tenth line first page of this paper.

In the 10th line second page the words "branch of;" in the 18th line 2nd page the word "on;" in the 7th line 3d page the word "steep;" in the 13th line 3d page the word "wagon."

United States land office, Cœur d'Alene, Idaho, June 5th, 1886.

JAMES F. LEGATE, *Receiver.*

Indorsed: Field-notes of survey of Wallace, U. S. Lot Placer Center mining district, Shoshone county, Idaho.

I told Mr. Wallace if I concluded to accept his proposition, I would be there, or have my foreman, Mr. Hawes, there in 30 days with a mill and stock of goods. I went directly to Portland and bought the saw-mill and stock of goods, and sent them in, in charge of Mr. Hawes, who has been in my employ, more or less, for 10 years. I stated to Mr. Hawes that when he got back there I presumed that Mr. Wallace would make the deed and he could go on and cut the timber, set up the saw-mill, and put it in operation, and gave Mr. Hawes authority to take possession of the block, set up the mill, and go to manufacturing lumber to build the hotel. Colonel Wallace said he was going to, or had, laid this 80 acres off into blocks, but there was nothing there you could see it was laid off besides the corner stakes of the blocks—he laid it into blocks and streets, as I understand it. At the time I was there in June I was over that ground, over block 22—all around on the bottom. The corner stakes of the block were set at that time. I didn't see anything to mark any lots in the interior of the block; I think I would have seen any stakes marking lots if they had been very plain; the brush and logs were very thick. I next returned to this town of Wallace, or where the town of Wallace now is, in October, 1886. When I returned there I found Colonel
37 Wallace there, and Mr. Hawes my agent, there, and the mill was running, cutting timber, when I got there, and Mr. Hawes had put up a small store and put a stock of goods in there, and also started to build a hotel. When I returned at this time Mr. Wallace gave me a deed for this block 22. At the time I was

first there, I think, Mr. Wallace showed me a power of attorney to him from Walter Bourke, the scripee. (The paper marked "Exhibit B" shown witness.) I think I saw that paper at the time I was there first; he showed it to me at the same time he showed me the certificate of entry, "Exhibit A," here; that is my recollection; he showed me those papers in connection with making the deed to me, as evidence that he had some authority, as I understand it. This ("Ex. B") is the document he exhibited to me to show his authority to convey these premises.

Power of attorney, marked "Exhibit B," and deed, marked "Exhibit C," both offered and received in evidence and read to the jury.

EXHIBIT "B."

Know all men by these presents that we, Walter Bourke and Flora Bourke, his wife, of Winnipeg, province of Manitoba, British possessions, have made, constituted and appointed, and by these presents do make, constitute and appoint William R. Wallace, of Shoshone county, in the Territory of Idaho, our true and lawful attorney for us and each of us individually, and in our name, place and stead, to enter into and upon, and take possession of any and all pieces and parcels of land or the timber and other materials thereon, in the Territory of Idaho, which we now own, or which we may hereafter acquire or become seized of, or in which we may now or hereafter be in any way interested; under and by virtue of location of Sioux (or Dakota) half-breed scrip No. 430, letter C, for 80 acres issued to myself, the said Walter Bourke, under act of July 17, 1854, United States Statutes at Large, page 304, chapter 83, authorizing the issuance of said script in exchange for lands of the Sioux half-breed reserve at Lake Pepin, Minnesota; and to prosecute and defend any and all suits at law, for us and each of us individually, in the said courts of said Territory of Idaho or of the United States, relating to the title to said land; we further authorize and empower our said attorney to grant, bargain, sell, demise, release, convey and confirm said land, or any part thereof, or the right to sever and remove timber and other materials therefrom, to such person or persons and for such prices as to our said attorney shall seem meet and proper, and thereupon to execute, acknowledge and deliver in our name and on our behalf any deeds, leases, contracts or other instruments sealed or unsealed and with or without covenants and warranty as to him shall seem meet to carry out the foregoing powers, with full power to our said attorney to appoint a substitute or substitutes to perform any of the acts which our said attorney may by this
38 instrument — authorized to perform, with the right to revoke such appointments at pleasure; hereby giving and granting to our said attorney or his substitute or substitutes full power to do and perform everything proper or convenient in carrying out and executing said powers as fully as we, or each of us individually, could do if personally present and acting in the premises. And we do further authorize and empower our said attorney from time to

time and at all or any time hereafter to make and execute, or cause to be made and executed, any such further deeds, conveyances, demises, or leases to said lands or any part thereof for the further and more perfect assurance and confirmation of the title to said premises, to the purchaser or purchasers, their heirs or assigns.

And in consideration of the sum of $200 to us in hand paid by our said attorney at the unsealing hereof, the receipt whereof we do hereby acknowledge, we do further appoint and ordain that our said attorney is hereby irrevocably invested with the powers before granted, and we do hereby forever renounce all right in us to revoke any of said powers or to appoint any person other than our said attorney to execute the same, and forever renounce all right on our own part personally to do any of the acts which our said attorney is authorized to perform, and we do hereby release unto our said attorney all our claim to any of the proceeds of any sale, lease, or contract relative to said lands or timber or material thereon, and we hereby revoke all powers of attorney by us heretofore made authorizing any person to do any act relative to any part of said land.

Hereby ratifying and confirming whatsoever our said attorney or any substitute appointed by him may do in the premises by virtue hereof.

In witness whereof we have set our hands and seals this 27th day of February, A. D. 1883.

WALTER BOURKE, *Scripee.* [SEAL.]
FLORA BOURKE. [SEAL.]

Signed, sealed and delivered in the presence of—
M. I. GOODWIN.
H. P. LEA.

CONSULATE OF THE UNITED STATES OF AMERICA }
At Winnipeg, Province of Manitoba, Canada, } ss:

Be it remembered that on this 27th day of February, in the year one thousand eight hundred and eighty-three, before me, James W. Taylor, United States consul within and for said district, personally appeared Walter Bourke and Flora Bourke, his wife, well known to me to be the persons who are described in and who executed the within and foregoing instrument, and severally duly acknowledged to me that they executed the same freely, and the said Flora Bourke, who is described as a married woman and whose name is subscribed to the within and foregoing instrument, upon an examina-
39 tion without the hearing of her husband, being by me made acquainted with the contents of said instrument, thereupon acknowledged to me that she executed the same freely, and that she did not wish to retract such execution.

In witness whereof I have hereunto set my hand and official seal of said county, the day and year above written.

JAMES W. TAYLOR,
United States Consul, Winnipeg, B. N. A.

(Indorsed:) 2756. Power of attorney from Walter Bourke and Flora Bourke to W. R. Wallace. Filed for record in the office of the county recorder of Shoshone county, Idaho Territory, June 15, 1886, at 4 o'clock p. m. Recorded in Book A of Power of Att'y, page 162, at request of W. R. Wallace. Thos. E. McLelland, county recorder, by M. J. Sweeny, deputy.

EXHIBIT C.

Warranty Deed.

This indenture, made this 31st day of July, in the year of our Lord one thousand eight hundred and eighty-six, between Walter Bourke, by his attorney W. R. Wallace, of Shoshone county, Idaho Territory, the party of the first part, and E. D. Carter, of Humbird, county of Clark and State of Wisconsin, the party of the second part.

Witnesseth: That the said party of the first part for and in consideration of the sum of two thousand dollars currency of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell, convey and confirm unto the said party of the second part, and to his heirs snd assigns forever, all that lot, piece or parcel of land situate, lying and being in Wallace, county of Shoshone and Territory of Idaho, particularly described as follows, to wit: block 22 (twenty-two) in said town of Wallace, consisting of twenty-four town lots, each of 25 x 100 ft., and bounded on the north by Lockey St., on the south by Bank St. and on the west by Sixth St., on the east by Seventh St., the title of said land having been vested in the party of the first part by location of half-breed Sioux script issued to the said Walter Bourke, under an act of Congress of July 17th, A. D. 1854, in exchange for lands held by said party of the first part at Lake Pepin, Minnesota, and now located and duly recorded in the U. S. land office with field-notes of survey as provided by said act of Congress, at Cœur d'Alene City, Idaho Territory.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity of the said party of the first part, of, in and to the said premises and every part and parcel thereof, with the appurtenances.

To have and to hold all and singular the said premises with the appurtenances unto the said party of the second part, his heirs and assigns, to their own proper use, benefit and behoof forever, and the said party of the first part for himself and his heirs, executors and administrators do hereby covenant, promise, and agree to and with the said party of the second part, his heirs and assigns, that the said party of the first part at the time of the sealing and delivery of these

presents was lawfully seized in himself of a good, absolute, and indefeasible estate of inheritance, in fee-simple of and in all and singular the said premises with the appurtenances, and has good right, full power and lawful authority to grant, bargain, sell and convey the same in the manner aforesaid, and that the said party of the second part, his heirs and assigns, shall and may at all times hereafter peaceably and quietly have, hold and use, occupy, possess and enjoy the said premises and every part and parcel thereof with the appurtenances, without any let, suit, trouble, molestation, eviction or disturbance of the said party of the first part, his heirs or assigns, or of any other person or persons lawfully claiming or to claim the same, and that the same now are free, clear, discharged and unincumbered, of and from all former and other grants, trusts, uses, titles, charges, estates, judgments, taxes, assessments, and encumbrances of what nature or kind soever.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

WALTER BOURKE, [SEAL.]
By His Attorney.
W. R. WALLACE. [SEAL.]

Signed and sealed in the presence of—
H. E. HOWES.
M. D. FLINT.

TERRITORY OF IDAHO, } ss:
County of Shoshone, }

On this 18th day of October, A. D. one thousand eight hundred and eighty-six, personally appeared before me Thos. E. McLelland, a notary public in and for said Territory of Idaho, Walter Bourke by W. R. Wallace, his attorney-in fact, whose name is subscribed *in* the foregoing instrument as party thereto, personally known to me to be the person described in and who executed the foregoing instrument as attorney-in-fact for Walter Bourke, party thereto, freely and voluntarily, and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

THOMAS E. McLELLAND,
[SEAL.] *Notary Public in and for the Territory of Idaho.*

Endorsed: Block 22, 3880. Warranty deed. Walter Bourke to E. D. Carter. Recorded at the request of W. R. Wallace,
41 October 18, 1886, at 50 minutes past 11 a. m. in Book K of Deeds, page 607. Thos. E. McLelland, county recorder, by M. J. Sweeny, deputy. $3.50 paid.

Mr. Wallace gave me this deed marked "Exhibit C" when I returned there in October, 1886. When I went back in October this block was covered with very heavy timber, a large amount of dense

timber and heavy cedar; the limbs grew close to the ground in many instances; it had a small portion of timber suitable for saw-logs, and I cut the timber that was suitable for saw-logs and hauled it to the mill; probably not one-fourth of the amount of timber on the block was suitable for saw-logs; the balance was logged up and burned on the ground; it was cleared of everything except the stumps, unless it might be very few small logs that were partially burned up. I had my teams on there and rolled it up in log heaps and burned it up; it was done in the year 1886, and during the year 1887. The expense of clearing this block was somewhere in the vicinity of three or four hundred dollars, not less than that. I have an account of but only a portion of the expense. My men were working at the mill portions of days, and when the mill was not running they were clearing this block. There were times when the mill would lie idle from stoppages of different kinds, and during that time we have no specified account of just the time put on the block or this ground. I have the accounts when they worked full half days or full days on this ground and did nothing else. I know the team labor is not included in the account. I have the account here in my day book for the years 1886 and 1887, from August 13, 1886, to September 1, 1887; I know the items to be correct of my own knowledge. This is the book of original entries. Besides that there was a time book in which the men's time was kept to the end of the month, and at the end of the month was entered in the time book. These time books were burned up, I am sorry to say. (Witness reads from items charged in the book as follows:) "Credit under date of June 30, 1887, A. G. Jenkins, by three days' labor block 22, at $2.50 per day, $7.50; E. D. McDonald, by four days' labor on block 22, $10; Albert Alderman, page 188, by nine and one-half days' labor, block 22, $2.50 per day, $22.75, under date of June 30, 1887; W. A. Langley, by nine days' labor, block 22, $2.50 per day, $22.50, same day and page." In the aggregate, $27. For the month of July, credited up under date of August the 1st, 1887, page 221, "Albert Alderman, by two and one-half days' labor clearing block 22, $6.25; W. A. Langley credited by three days' labor clearing block 22, $7.50; David Owens, by three and one-half days' labor, block 22, at $2.50 per day, $8.75; August 22, A. G. Jenkins, two days' labor in July clearing block 22, at $2.50 per day, $5.00." There are other items that do not appear here. I paid Edward McDonald $30 for clearing, then the portions of days the men worked clearing that block we have no account of, nor of the team-work. The logs that were cut into timber were cut by the thousand. I had some teams, and they were used for hauling the logs together for burning, the same as is the custom in clear-
42 ing up any land. I built a sidewalk around the entire west side of this block, and the entire north side, less 50 feet, and pieces of sidewalk on the south side, 50 feet on the south line to the southwest corner, and 25 feet more in front of the building I had on lot 22. This sidewalk in front of the lot 22 was part of the porch. I superintended the construction of the sidewalk on the west side myself, in connection with the mechanic; it was four feet wide,

built from two-inch plank, and I think 4 x 4 or 4 x 6 for stringers; the ground being somewhat uneven, we put in posts in order to bring the sidewalk to a level. The sidewalk on the north side was six feet wide, two-inch plank, and built in a similar manner. My object in cutting down and rolling up these logs and timber on this ground and burning it up was to clear this block with a view of building upon it. The sidewalk was built for the purpose of improving the block, as well as for the convenience of travel. These improvements of clearing the lots and the sidewalk were made under my claim of ownership to the block and the lots in controversy; I had bought and paid for it and claimed it for myself, and cleared it up with a view of holding it for my own disposition. I bought it and paid for it, and supposed I owned it as much as any piece of property I ever owned in my life. I purchased a water right in the year 1887. I purchased a water right and we laid a main and brought the water to the corner opposite block 22. I could not state, at this time, from my recollection, whether the mains were laid on the west side of the block 22 or not, I can only say they are there now. The water right was located about 1,200 feet south, possibly a little west of the block, up the side of the mountain, at an elevation of 170 feet; we laid a four-inch main; my recollection now is that it was 1,000 or 1,200 feet long—I think 1,000 feet, the main was—it was laid in the summer of 1888; it has since, however, been brought to the block. My impression is that it ran all the way to the block on the west side. I paid $500 for this water right. I commenced the construction of this pipe or main from this water right in the direction of this block in the month of June, 1888. This main had been constructed—1,000 feet of four-inch main—when I left in the fall of 1888; I was there to help connect it. When I returned next, after the 19th of February, 1889, this main had been constructed the entire length of block 22, across the street to the adjoining block, clear to the Cœur d'Alene river, and in various other directions. The cost of this main from the water right on the hill to the northwest corner of block 22 was about $1,200. Prior to the 19th of February, 1889, I built two buildings upon the north half of block 22; one costing $890, and the other $540. The building that cost $890 was erected in the month of June, 1888, and the one that cost $540 was erected in the month of October, 1887. (Map marked "Exhibit D" shown to witness, and placed upon the wall.) That is a map purporting to show block 22; it is a correct diagram of the exterior of block 22, and of the buildings that are upon the block.

43 Map marked "Exhibit D" offered and received in evidence.

I built this piece of sidewalk here in front of the building on the south side of the block (pointing to the map); I furnished the plank for the building of this sidewalk from the southwest corner of the block 22, running east 50 feet; I also built sidewalk from the southwest corner to the northwest corner of the block, in the month of December, 1887. I superintended the building of it myself; it is four feet wide. I built sidewalk from the northwest corner the entire length of the north side of the block, less 50 feet.

I built this two-story house costing $900 (pointing on map) and this one-story building costing $540. One is marked "two-story house," and the other "one-story house," on the map. The two-story building cost $900, less three or four dollars, the one-story building cost $540. I cut some timber off of this block under a contract of stumpage at so much a thousand; that is, I bought all the timber on the entire town site from Colonel Wallace, and was to pay him one dollar per thousand. It was talked of at the same time I bought this block; I bought it before; I paid him for all the timber that was manufactured that came off of the town site as a whole, one dollar per thousand, I paid him about $500. I also paid him for the timber I sawed off of this block in controversy. The timber I paid for cutting by the thousand was what I hauled to the saw-mill for lumbering purposes; none of the money paid for cutting timber for the saw-mill has been charged in my account as improvements on this block. The cost of cutting the logs suitable for lumber would be a very small proportion of the cost of clearing the block. The limbs on the cedar trees came down very low on a great many of them, and the limbs were very thick. There were some trees there, I would say, that covered an area of at least 30 feet in diameter. When the timber was cut down, and the brush, tree tops and logs had been removed, it was in an impassable condition—about the same condition as the slashing of any logging camp. After the timber was cut down, we hauled it up into heaps and burned it. I paid the taxes assessed against me by the county assessor for two years. (Paper shown witness.) That is my tax receipt for 1887.

The tax receipt is offered and received in evidence, marked "Exhibit E," and read to the jury, and is as follows:

EXHIBIT "E."

TERRITORY OF IDAHO, } No. 34.
County of Shoshone. }

$261.46. MURRAY, IDAHO, *Nov.* 15, 1887.

Received of E. D. Carter $261.46, the amount of his property tax for the year A. D. 1887. Assessed value of personal property, $2,265. Description of real estate 10 lots block 21, also of block 22, also of block F, town of Wallace.

Assessed value, $5,100.

44 Rate of taxation, $3.55 per $100.

J. B. FENN,
Tax-collector.

(Another paper shown witness.) That is my tax receipt for the year 1888; the receipt I obtained from the tax-collector when I paid the taxes.

Paper offered and read in evidence and marked "Exhibit F" and is as follows:

EXHIBIT "F."

TERRITORY OF IDAHO, } No. 76.
County of Shoshone. }

$758.78. MURRAY, IDAHO, *Dec.* 7, 1888.

Received of E. D. Carter $758.78 the amount of his property tax for the year A. D. 1888. Assessed value of personal property $7,125. Description of real estate, lots 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23 and S. ½ of 8 block 21; lots 2, 4, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 22, 23, 24, and S. 314 of 1 and 3 bl'k 22; lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, bl'k F and improvements, town of Wallace.

Assessed value $21,374.

Rate of taxation $3.55 per $100.

J. B. FENN,
Tax-collector.

I think I paid the city taxes in the town of Wallace upon these premises in controversy (paper shown witness). That is the receipt I obtained when I paid the city taxes.

Paper offered and read in evidence and marked "Exhibit G," and is as follows:

EXHIBIT "G."

TERRITORY OF IDAHO, } No. 27.
County of Shoshone. }

$213.74. TOWN OF WALLACE, *Dec.* 13, 1888.

Received of E. D. Carter two hundred thirteen and seventy-four one-hundredth dollars, the amount of his property tax for the year 1888.

Description of real estate lots 5, 7, 9, and 11, bl'k 21; lots 8, 9, 10, 11 and 12, bl'k F; lot 19, block 22; lot 20, bl'k 22; S. ½ lot 8, bl'k 21; lots 2, 4, 6, 8, 10, 12, 14, 16, 18, 22, 24, 9, 11, 13, 15, 21, 23 & S. ¾ 1 and 2 bl'k 22; lots 1, 3, 13, 15, 17, 21, 23, bl'k 21; lots 1, 2, 3, 4, 5, 6, 7, bl'k F; lot 19, bl'k 21.

Assessed value of real estate $14,249.

Assessed value of personal property $7,125.00.

Rate of taxation one dollar per hundred.

C. M. HALL,
Tax-collector.

The clearing I have testified to in this block covered the lots in controversy in this action; all of the logs and brush and
45 tree tops had been burned up, with the exception perhaps of two or three logs that I did not entirely burn. It is barely possible there was two or three logs on there that were not all burned up; but the tree tops and stuff left upon the block generally

had been rolled up and burned up. I have never abandoned or ceased to claim this entire north half of block 22, but I have continued to add improvements up to the time of jumping, on or about the 19th day of February, 1889. I have at all times owned the buildings I put up on the north half of the block since I erected them. I should say not less than $200 worth of clearing on this block was done upon the north half of the block; this is independent of cutting timber for the saw-mill. The value of these premises in controversy in this action on the 12th of April, 1889, was not less than $10,000. I had a tenant in the two-story house on the north half of this block the 19th of February, 1889, Mr. J. C. Fredo; he had been there about eight months, and remained there until about the 25th of March, 1889. In 1888 the Fourth of July committee came to me and wanted permission to put up a dance-floor and a place to speak on the Fourth; I gave them permission to put this up on the west side of the north half of block 22; right along here (pointing it out on map), not right at the corner, but commencing about 25 feet from it, I believe. I also loaned them lumber for that purpose, as well as to erect the structure on the ground for the Fourth of July use. I told them I would do that, with the understanding that they would take the lumber down and pile it up in good condition after they were through with it; it was dressed flooring. After they were through with it they took the lumber down and piled it up on the ground, and it was left there for quite a considerable time on the ground. I can't remember the exact size of the platform or building they erected, but I am under the impression it was about 50 feet long. I furnished them all the material, to the best of my recollection; I would not be positive about the sills; my impression is that the lumber remained piled up on the lot for two or three months.

Cross-examination of witness E. D. CARTER by Mr. GANAHL:

I cannot remember distinctly who the committee were, but I am under the impression it was Mr. McKissick, for one, and Mr. Hawes; but I would not be sure who the committee of arrangements were. Mr. Hawes and Mr. McKissick are all I remember. I did not see the dance platform erected; I was not there on the Fourth of July, 1888. I am talking about the arrangements made just before I left in the latter part of June, about the 30th of June; I am not sure as to the date. If my recollection serves me rightly, I returned about September, 1888; I went East. I came back in September with my family; I went to Wisconsin in July and returned in April, 1890. I was away from Wallace from September, 1888, until July, 1890; I believe that is correct. I returned to Wallace in 1890. All
46 I know about the Fourth of July platform is that McKissick and Hawes applied to me in June for permission to put up a platform to celebrate the Fourth of July on this ground. They applied to put it up on 2, 4, and 6, I think it was on the northwest corner. The lots in controversy in this action are 2, 4, 6, 8, 10, 14, 16, 18, 22 and 24. Lots 12 and 20 are not in controversy. It was

upon lots 12 and 20 that these buildings were erected. I was first on the ground, the subject of this litigation, about the 20th or 22d of June, 1886. I remained in Wallace at that time about ten days. I was on this block 22; it was pointed out to me by Colonel Wallace. I believed it had been surveyed into blocks. I agreed to pay $600 for this block; there were no parties whipsawing lumber on the block at that time. I was around this block 22; cannot say I examined the stakes at that time. I was to have one of the two blocks—either that block or the block west of it. I left it to Mr. Hawes to select the block. Mr. Wallace said I could have my choice of block 22 and the one west of it. I don't remember how the blocks run. I did not know that Hollahan was in possession of the block west of this at that time; I did not know whether Mr. Hollahan was in possession of this block west of block 22 at that time. My recollection is there were no buildings on the block west of block 22; I think they were on the other side of the street. Before I went to Portland, I told Mr. Wallace if I concluded to accept his proposition I would be there within thirty days or have a man there with a saw-mill and a stock of goods. Mr. Hawes was there within that time; he was my agent. I have known him a long time; he had been my superintendent in the vicinity of ten years prior to that time, in Wisconsin. He came out here with me. Mr. Hawes remained on the ground—came back from Portland with this saw-mill and store; I came back there in September or October; found Mr. Hawes superintending my business generally, running the saw-mill and putting up some other buildings; he had designated the block I was to take, and had been cutting timber on the block; I could not say he was in possession of that block, he was cutting the timber off, the timber I had bought on the town site at large. I did not consider I had taken possession of that block until I had returned and got the deed of it, only to cut the timber for the mill purposes. Mr. Hawes was cutting the timber at different points anywhere he chose on the town site. I could not say positively how much timber, or if any, he had cut on block 22 when I returned in October. I could not say that he had cut any on the block at that time; up to October he had cut around the mill; it was a dense forest, and he had cut the handiest timber he could get at to manufacture into lumber to build the buildings with. Mr. Hawes was cutting timber for manufacturing purposes when I returned. I could not say whether he was in possession of the block 22 or not. He was in possession of the ground. Yes, sir, so far as cutting logs to haul to the mill was concerned, I had bought the timber off of the whole town site, or so much of it as I wanted. When I returned in October my saw-mill was erected. It was not erected on block 22 or
47 on other lots I had bought from Colonel Wallace. I do not think it was on block 21 or block F; do not remember the number of the block the mill was on, but it was east and south of block 22; did not erect it upon block 22 or block F or block 21, as it was not a good place, I suppose, to put a mill, and Colonel Wallace gave us permission to put the mill there where we did put it.

I returned approximately the middle of October; do not remember just the time. I think this deed, Exhibit C, was delivered to me by Colonel Wallace about the 18th of October; I think I had it recorded; I believe it has been in my possession ever since. I explained this endorsement on the back of the deed, "Recorded at the request of W. R. Wallace, October 18, 1886, at 50 minutes past 11 a. m., in Book K, of Deeds, page 607, Thomas E. McClelland, county recorder, by M. J. Sweeny, deputy;" from the fact that I did not know the recorder or anything about it, and I requested Mr. Wallace, I presume, to send it and have it recorded for me, and I would pay for it; I don't know whether I returned it to Mr. Wallace; I think it has been in my possession ever since. I cannot say positive but that I handed it back to him to have it recorded, because I was an entire stranger there. Murray, the county-seat, is about 18 miles from Wallace. I never was at Murray until last fall. I speak from recollection as to the time of the delivery of the deed, I could not state positively as to the day, but I suppose it was about that time; I cannot state positively the day the deed was handed to me, but it was handed to me by Colonel Wallace and I paid for it; I do not think it was delivered to me before it was acknowledged and witnessed; I do not think it was delivered to me before the 18th. I think it was delivered to me at the time or after the acknowledgment, that is my impression. I paid $600 for it; do not remember about getting any receipt for the $600. My recollection is Colonel Wallace showed me the power of attorney to execute the deed when I was first there in June or July, showing me that he had authority to sell, that I could purchase from him; I think the power of attorney and certificate of entry were shown to me prior to the time he delivered the deed; my recollection is he showed me the power of attorney when I was first there in June or July. (Paper marked "Exhibit B" shown witness.) That power of attorney is signed by Walter Bourke and Flora Bourke. Bourke's name is spelled B-o-u-r-k-e, as I read it. (Deed marked "Exhibit" shown witness.) The name seems to be B-o-u-k-e in the deed. On the face of the deed it seems to be B-o-u-k-e, and on the back of the deed it might be B-o-u-r-k-e. (Paper shown witness marked "Exhibit A.") That is the certificate of the register and receiver. That is the title I understood Colonel Wallace proposed to convey to me under this deed; I understood he was making a deed from Walter Bourke to me, based upon his entry of land in the Cœur d'Alene land office. He showed me this receipt at the time. The land had already been entered. This is the register's and receiver's receipt of the
48 entry. I think he showed me the power of attorney from Walter Bourke authorizing him to make the entry; that is the document you just showed me. That is the document he showed to me, if I remember it correctly. Do not remember that he showed me any other power of attorney than this "Exhibit C." I do not remember that he showed me any power of attorney from Walter Bourke to locate this script 430 C. He showed me this power to sell and the land office receipt, and I supposed that was enough, and I bought in the best of faith. The possession I claim to hold of

these premises in controversy is under the deed and by possession; I entered into possession under the deed, as I supposed—I supposed it was mine beyond a question. I entered under the deed. Mr. Hawes made the selection of the block as my agent and took possession and awaited my return for my decision, and we entered into possession and went to clearing it; previous to that he had been cutting timber all over the town site where it was the most convenient, and cutting the timber near the mill. I went into possession in October, and entered in good faith, believing this Sioux script location was valid. I did not know that this Sioux script location was set aside at the time the defendants entered on the 19th of February, 1889. I did not know up to the time of the jumping; I was as much surprised as anybody—a little more so. I saw Colonel Wallace in 1887 and 1888. He did not communicate the fact that he had received this intelligence of the cancellation of this entry. I am positive of that. I was a member of the Wallace town site to a very small extent; I believe Mr. Albert Allen was a member of that company. He did not inform me of the cancellation of this entry; I am positive of that. The first I heard of it was a piece of paper sent to me in Wisconsin, the next issue of the Wallace Free Press after the committee went down to the Cœur d'Alene land office. I presume I had corresponded with Col. Wallace from 1888 to 1890. I went to Winnipeg to find this Indian, but not before the jumping. I held one share of stock in the Wallace Town Site Company; I believe it was for the purpose of helping to elect officers, I think I voted on it at the first meeting. After my return to Wallace from Portland in October, 1886, I went upon the land and cleared off the timber. The most of the clearing was done the next summer in 1887. Then after cutting the logs that were suitable to make lumber of, which was a very small portion of the timber on the ground—we logged up the balance, the remaining timber on the ground and cleared it up—cleared it up, practically—all but the stumps. There might have been two or three logs partially burned up; some stumps were burned up, as we made it a point to put the logs up against the stumps when it was convenient and burn them out, what we could. It was covered with very dense cedar. I do not think I testified that I cleared it all up in 1886; the timber was not all cut off in 1886. I cannot say positively that Hawes was cutting the timber off of this block when I came there from Portland in October, 1886; he may have cut some on that block, but he was cutting the timber adjacent to the mill
49 that was the most convenient. The merchantable timber was cut off of block 22 for the purpose of manufacturing into lumber. The timber on that block was chiefly a large, heavy growth of timber from 18 inches to perhaps six or eight feet in diameter at the butt, what we call churn-butted trees; that is, we so denominate them; they spread out at the bottom. The first logs was most universally rotten, and we could only get one or two logs that were sound. There were a good many trees that were not good for lumber there. The minimum trees fit for lumber were about 18 inches in diameter. The larger part of the trees were too rotten for lum-

ber. We cut all those trees down and took that portion which was good from the trees. The trees manufactured into logs were cut down by contract; the balance were not. One object in cutting the trees down was to supply my mill with lumber. We dug out some stumps when we run the sidewalk on the north side. Cannot designate the exact location; there was one or two stumps dug out. That sidewalk on the north side was laid in March, 1888. I superintended it myself. The building was erected in October, 1887; the sidewalk was not erected until the following March. It was not particularly the object and purpose of that sidewalk to allow a passageway from lot 20 to Sixth street. I erected the sidewalk for the purpose of improving the block as well as facilitating walk from the building. The enabling of the occupants of that house to get to Sixth St. was not the exclusive object, by no means, of building the sidewalk; it was done to enclose it; that sidewalk would have been built on the east side of block 22 if they had kept off of it. I furnished the material to build 50 feet of sidewalk on the south side of the block; I was not paid for it; I do not know who did the mechanical work, I say I furnished the material. I delivered the lumber to Mr. McKissick's order, with the understanding with him there would be a walk built; I don't know who did the mechanical labor. That was done, if I remember correctly, in 1887. The object was to improve that part of the block the same as the balance of the block. The reason I did not build the sidewalk to the east on the whole extent of the south side was because I could not build all the sidewalk at one time. I done quite a lot of building around there. The sidewalk on the west side from Cedar St. to Bank St. was built in December, 1887. I don't think the railroad had come in then; I think the cars only run to Osburn, but I would not be sure. In pursuance with my contract with Mr. Wallace, concerning which I have testified, I erected a hotel south of block 22 on what is now known as Hotel St., there being one street and a half block intervening. It was then and is now called Hotel St. A man by the name of Anderson was running the Carter house in December, 1887. It was not exclusively the object of the sidewalk on the west side of this block to furnish a footway for pedestrians coming from the north and from the depot. I expected people to walk on it; it was to improve the block. It was not continued to the
50 Carter house; it was continued by some other parties to a point opposite the Carter house. I don't think Mr. Anderson built that part of the walk beyond the block. I know a hotel to the north of Cedar St. on the next block north fronting on the corner of Sixth and Cedar streets, kept by Mr. Arment and known as the Wallace or Arment house. I think he put up a hotel along that fall. I don't think he had built any sidewalk from his hotel running north to the depot at that time. It was not my object in building the sidewalk, to connect with sidewalk built by Arment; it was built for both purposes—for enclosing block 22, and to enable passengers coming from the depot to reach the Carter house dry shed; the main object in building it was to improve the block and facilitate travel. According to my recollection the sidewalk from

Mr. Arment's house was not built until the next March—I was there in March, 1888. I think I left there in July; I am quite positive that Mr. Arment's sidewalk was not constructed until the following March. I was not aware at that time, of the necessity of enclosing the block. I relied strictly upon my title derived from the half-breed Sioux script; I expected to improve the block. The stumps left on the ground upon the lots in controversy were as thick as I ever saw timber grow of the same size; it was very thick timber—very large timber. The stumps were left standing there close and thick together, two or three feet high; they were sawed off; all the trees were cut down. I last saw the lots in 1890, about the 1st of July or the last of June; they were all cleared at that time, and the trees all cut down; it had all been logged up and burned. There might possibly be a log or two left that did not burn up. I cannot designate the particular lots; the logs might have been hauled off from some. There was not 150 cords of wood cut on those lots 22 and 24 after the location of the defendants there; never heard such a statement. I did take the precaution to enclose this property by building a sidewalk. I call that an enclosure. The sidewalk did not extend around the entire block. It enclosed the lots on the west side and on the north side, less 50 feet, on the east and on the south and east, next to the alley. I enclosed the lots on the south and east, if you consider the block cut in two; they were not enclosed on the south and east there was an alley running through this block. The map with reference to which I have been examined does not correctly designate the lots in controversy by lot. It correctly designates the north half of block 22 with the exception that the alley is not marked. The alleyway cuts the block clear through. I bought the property by deed, which calls for block 22, consisting of 24 lots 25 by 100 each. I entered under that deed. I never saw any stakes about that block except the corner stakes of the block; saw no stakes marking the alley; I don't remember that I saw any stakes marking the alley. There was an alleyway running through there, but it was not used to the same extent as the street and never has been. It is my impression that there is a building standing in that alleyway now, but I am
51 not sure. I think it was on the end of the alley facing Sixth street at the time of the fire in 1890, but I am not positive. The deed I entered under called for 24 lots; they faced north and south—12 on Cedar St. and 12 on Bank St.; 25 feet each on Cedar and Bank running back 100 feet. That left a space of 25 feet between the two sets of lots. The way I enclosed the block was that I ran the sidewalk the entire length of the block, across the alleyway; I intended to run the sidewalk around the block, the alley did not enter into my mind. I contemplated selling the lots the other way, and did sell some lots the other way from the way the lots were platted; that is, facing the buildings on Sixth St. instead of on Cedar St. I sold Mr. Sherwin the back end of two lots; they were not the lots in controversy here. My deed did not designate how I should run the sidewalk. I claim the alley under the deed; I claimed the whole block. I had not seen any plat—not

a regular plat as exhibited here the other day; I had not seen any at the time of my purchase. Col. Wallace designated to me how the blocks were located, and I think he had some sketch or something in his office, but no regular plat. I never saw any regular plat until long after I purchased the block. He did not show me such a map as was exhibited here. I do not remember that he said who surveyed the ground. I understood the 80-acre tract covered by the Sioux scrip location had been laid off in blocks. All I saw in the way of a map or plat was a rough sketch in Col. Wallace's office, a pencil sketch of the town at large; no regular map the same as Mr. Trask exhibited here. Mr. Trask designated to me where the block was located and the way the streets run. And pointed out to me the way the streets run. I would not swear positively he did not show me even a sketch, I think he did. I bought without seeing a map when I was first there in June. When I went back in October he had something more of a map. When I took the deed and before paying the $600 I think I saw a map. I think it was rolled up, I looked at it and saw how the block was located, was all. I don't remember whether I read the numbers that designated 24 lots embraced in the block; I don't remember what the map was he showed me; I believe I read the deed. I think I did see a map of that town, as he had it in his office. I don't remember what I did then; I could not remember just what precaution I took about the boundaries of that block. I presume I looked at a map if he showed me one, where the block was located we could see the ground right there. He did not point out the 24 lots embraced in the block lot by lot; he pointed out the block and I went around the block to see where it was located. I found no corner stakes at the alleyway; I found the four corner stakes. The map, I think, showed—might have showed—an alley; I don't remember that particular part of it, about the alley; I bought a block there, about an acre and $\frac{5}{8}$. I have been examined here with reference to water works. I owned the water works of that town.

As to the water main the water was taken out and conducted
52 to the Carter house; I think we conducted the water to the Carter house in the fall of 1886, but not from the main—that was simply by connecting it—putting a small inch pipe into a barrel. There was a barrel located at an elevation of 50 or 60 feet above the Carter house, perhaps 30 feet from there, and I connected an inch pipe to that and run it down to the Carter house; that was no part of our water main. The water main is now situated about 1,200 feet southwest of the southwest corner of block 22, up the mountain at an elevation of about 170 feet. One of the objects for which I brought in the water was to sell it to all of the inhabitants of the town. I am a citizen of Wisconsin; my family is in Wisconsin; I claim that as my home, although I have spent most of the time for the last six years in Idaho. I came to Wallace in 1886 in June, and remained there 10 days. I went to Portland and returned in October, 1886, I think; and I think I went to Wisconsin the latter part of November, 1886; I returned the following March and remained in Wallace until the 1st of July 1887, I then

went to Wisconsin. I returned with my family in September I think, 1887. My family remained with me until the next May 1888 and the last of June or 1st of July I went to Wisconsin. I remained in Wisconsin until April 1890, I think it was, when I came out. I was away some 20-odd months. I think I was in Wisconsin in April 1889, at the time this suit was brought. I was not acquainted with the value of lots in the town of Wallace at that time, from personal observation. My ideas of value were based upon my correspondence and general information respecting the town. I say I left Wallace in June 1888 and went to Wisconsin, I think it was in April 1890. I did not come back to Wallace after I left in June 1888, I think not; I think I am not mistaken about the date. I don't know of my own knowledge about people building anything on lots 2 and 4; I did not wait to see them build; I know they made that arrangement. The way I know of them storing the lumber there and how long it remained there, is, that I got it from my agent. I am not quite sure whether I was there at the time the entries were made in the book which I testified to this morning. I don't just remember the dates, at present, of the entries. They are in Mr. Anderson's handwriting. I paid these men, I think I paid them individually, all the paying that was done during the year 1887. I am not quite sure whether I was here when these entries were made. We did not settle with our men monthly; they were men that had worked for me for years. The book which I have testified to is termed a day book. It is supposed to be a book of original entry; we understand it so. Each day's transaction was not always put down in that book contemporaneously with the day. It is the only book of original entry we had. We sometimes, in charging lumber, have a figuring block or a little piece of book or something of that kind, to keep a kind of memorandum during the day. I do not think these entries in this book to which I have testified have been taken from some other book and written in there. The entry of time has been taken from
53 a time book, a regular monthly time book, showing the days the men worked and where they worked, and at the end of the month we drew off the time. It may be that that book, so far as it goes, is a book of original entry; we did not credit a man with the day's work every night. I had a shingle mill up there for the purpose of making shingles. I sold some of the shingles we made and some of them we used. They were made out of the lumber taken from this town site, from the logs. I can't say positively whether any of them were made from the lumber taken from the lots in controversy; we did not keep the logs separate that we made shingles from. We were selling common lumber for from $15 to $25. In the other case I testified that when I went in there, there was no saw-mill in that country, and that all the lumber they had they were cutting with a whipsaw, and it cost them $60 a thousand, and where I placed my mill was a bare tract when I went in there. I cut my lumber indiscriminately all over the town site; I purchased it, and anywhere Mr. Wallace allowed me to. I paid him for the lumber about $500 for stumpage. Some of the lumber I

paid him for came off of the lots in controversy. I paid him a dollar a thousand. The merchantable logs on these lots were haul d to the mill, I think. We cut down the large trees to find out what portion of them were merchantable, some of them, and some of them we did not, it was no trouble to designate a poor tree. My mill had a capacity of about 10,000 feet a day; it was not kept running to its maximum; it did not run steadily. It was stopped for various causes, sometimes for help, sometimes difficulty with the machinery; there was plenty of lumber there. The mill run; some of the time we were sawing lumber and some of the time dressing lumber, and some of the time made shingles; some portion of the mill might have been running. It was a steam mill. It was not the principal inducement for my going there, this large field for cutting lumber and for selling it; I had been in the lumber business and had got sick of it, in Wisconsin. I put up the mill for the profit so far as it went; it was necessary to have lumber to build with; I did not expect to run the mill for any great length of time; there was no mill within 15 or 20 miles that I know of. I could not state from recollection whether there were any assessments of taxes made against these lots in the year 1889. I don't think there was; I don't think the real estate in the town of Wallace, the land was assessed in 1889. I cannot tell why it was not assessed. I think a portion of the items I have referred to in my testimony this morning was for labor done upon the lots in controversy, but I could not designate the particular lot or piece of ground that the men were at work on those months, only that they were working on block 22. There was not to exceed 25 per cent. of the timber on block 22 would make lumber; I will venture there was three times as much left on the ground after we had the merchantable logs taken out as we took. That was burned up.

54 HENRY F. HOWES, being called and sworn as a witness on behalf of the plaintiff, testifies as follows:

I reside in the town of Wallace; I have lived there five years last June. Came to where Wallace now is in June, 1886, in company with Mr. Carter. We came to the town of Wallace for the purpose of making an investment. I was Mr. Carter's foreman or superintendent. Met Col. Wallace when we came there; he was residing there at that time. He claimed that he had located an 80-acre tract under Sioux scrip from Walter Bourke, and that he was laying out a town site on this 80 acres at that time. The 80 acre tract was marked on the ground with four corner stakes. He had three or four log cabins upon it at that time, and it had been run off into blocks and streets. The corner stakes marked the blocks. At that time I knew of block 22; it was marked with four corner stakes. There were no other stakes marking it that I saw at that time. This 80 acre tract was a dense cedar swamp, with the exception of one corner, it was covered solid with timber just as thick as timber could grow; it was not all standing, part of it was down and about $\frac{2}{3}$ in a swampy condition. The creek had overflown during the high water in the spring and it was covered with water. One-half or $\frac{2}{3}$ of the

creek was cut up with small streams coming from the main stream, which run through in different directions. One stream started in at the southeast corner of block 22 and came out at the northwest corner, running angling across block 22. There was a small dam built across the channel, about 75 or 80 feet from the southeast corner of the block. The effect of this dam was to turn the water back into the main channel. I was present at an interview in June, 1886, of Mr. Carter and Colonel Wallace, relative to the purchase of a portion of this 80-acre tract. Mr. Wallace made a proposition to Mr. Carter, that if Mr. Carter would buy a saw-mill, and build a hotel and put up a stock of goods in the town, within thirty days, he would sell him the block for $600.—This was in June, 1886. Mr. Carter finally agreed to his proposition. We left within a day or two after that, and went to Portland. Mr. Carter bought the saw-mill and stock of goods, and sent me back to Wallace with them. I went back there and erected a mill, and started to build a hotel, and put the stock of goods in the town, and put up a building there, and went on with the business until Mr. Carter came back. There was no saw-mill in that country at that time, that I know of. There was a little whipsaw that had cut not to exceed 5,000 feet of lumber on this same ground. There was no hotel there whatever, nor any stock of goods. Mr. Carter came back, I think, in October. In the meantime I had not done much of anything, with reference to block 22, unless it was to cut some timber. I picked that block out for Mr. Carter, provided he was satisfied with it. When I left Portland he told me to pick out one of the blocks, as he was to have a choice of blocks, and to designate some block for him, which I done when I came back, and that was block 22. I took it with the understanding Mr. Carter was to accept it when he came back, or not, as he saw fit.

55 Between the time I returned from Portland and Mr. Carter's return, I cut some timber off of block 22 for mill purposes—or for lumber, rather. My object in cutting that timber was partially to clean off the block, and partially for sawing in the mill at that time. A deed was made and exhibited to me from Mr. Wallace as attorney-in-fact for Walters Bourke, to Mr. Carter, for block 22. (Deed marked "Exhibit C" shown witness.) That is the document, that is my name attached there as a witness. I put it there some time in the month of July, I think, for the purpose of witnessing the deed for Mr. Carter. Walter Bourke's name is spelled B-o-u-r-k-e on the deed. My understanding was that it was to be Bourke B-o-u-r-k-e. I had seen the paper marked "Exhibit A" in this case prior to witnessing the deed, and had seen the paper marked "Exhibit B." My understanding was that the name intended to be signed to this deed was the same name expressed in "Exhibits A and B" as the maker of the power of attorney and the Scripee, for the reason that I supposed that Col. Wallace was deeding this ground away as Bourke's attorney. It was by virtue of this power of attorney that I, as the agent of Mr. Carter, was dealing with Mr. Wallace, with reference to this matter. When Mr. Carter returned to Wallace, we had one wing of the hotel nearly completed. After his return we continued work on the hotel, dur-

ing the fall and winter of 1886 and the spring of 1887, and during the summer of 1887; it was a very large hotel. The saw-mill was up and running when Mr. Carter returned; was using it to cut lumber to build the hotel. The next summer we built two houses on the north half of block 22; built the houses out of lumber manufactured at this mill. The stock of merchandise arrived in Wallace between the 1st and 6th of July, 1886; I was in charge of it. After Mr. Carter arrived the deed was delivered to Mr. Carter; I think it was some time in October, 1886. After the delivery of that deed Mr. Carter accepted the ground and told me to go at it and clear it off. I cut the timber off of it mostly in 1887, and cleared it up in 1887. We cut all the trees that would make saw-logs down first, and hauled them to the mill for manufacture; the balance was cut down and burned up. In 1887 Mr. Carter built a sidewalk on the west side of the block, and in the spring of 1888, some time in April, he built a sidewalk on the north side, with the exception of 50 feet. In 1888 there was a sidewalk built on the southwest corner. In 1888 the block was cleared of all timber, with the exception of stumps. I have in my possession a photograph taken of that town showing this block in the spring of 1888. (Witness produces the photograph.) From my knowledge, this photograph is a fair photograph and picture of the town as it appeared in the spring of 1888.

Photograph offered and received in evidence and marked "Exhibit H."

Block 22 is indicated on that picture by a sidewalk very plain on two sides of it, and two or three buildings. The photograph looks as though it was taken from the north looking south from a point about 800 feet distant from block 22. The block is indicated by the sidewalks, buildings and clearing the block off; you can see
56 it very plainly. There are two sidewalks shown on the picture besides those partially enclosing block 22. Two of the sidewalks are running down to the Northern Pacific depot from Arment's corner, and what is known as Fuller's corner. I know of my own knowledge that picture was taken in the spring of 1888. During the year 1888, there was a water main laid down the west side of the block 22, and the north side of block 22, within 50 feet of the northeast corner; it was a two-inch main; along what is known as Cedar street. (Witness points out on map plaintiff's map "Exhibit E," where the water main was laid by Mr. Carter in 1888.) The water main run along this, the west side, and across the north side, as far as here, this one-story building. This water main was laid by Mr. Carter some time during the summer of 1888—I cannot say exactly what time. It was a two-inch gas pipe. I was in Wallace on the 19th of February; part of that block 22 was jumped on the 19th of February, 1889, at about nine o'clock at night; I cannot say exactly, it was dark; on the northwest corner of the block, they had a fire there for the purpose of keeping warm during the night. There was a good many there, I think. Mr. Ruddy, Mike Murray, and Charles Robbins were the only ones who claimed any property,

that I remember, there right on that corner that night; they were holding possession of that ground. Mike Murray had a shotgun. I saw them there up to twelve or one o'clock; they were simply staying on the ground and keeping warm by a fire they had there. At that time I suppose they were all in together holding the corner—4 lots—100 feet square; the three or four men I have named stood on that corner, constituting four lots. They were together around the fire; could not say that I saw the defendant Donnelly there. Did not see C. M. Patterson there that night. I think I was acquainted with the value of property in the town of Wallace in April, 1889. I should judge that the value of the north half of block 22, excepting lots 12 and 20 was $10,000 or $12,000 on the 12th day of April, 1889. I was a member of the Fourth of July committee in 1888, and Mr. Carter was asked to furnish lumber there for the purpose of putting up a building for the uses of the Fourth of July committee. He done so, and the lumber was delivered on lots 2, 4, and 6 of block 22; by Mr. Carter's permission. He furnished the lumber and the building was put up and used for the Fourth of July celebration. We made arrangements with Mr. Carter for the use of the ground, provided the building would be taken down and the lumber piled up again. The building was taken down. It was covered with canvas, and the lumber was piled up on that ground. I can't say exactly how long it remained there; I bought the flooring in the fall of 1888 from Mr. Carter for the purpose of putting in my store; I bought the lumber some time in December, I think. Mr. Carter had the dam built, that I have spoken of, for turning the water off of block 22; I know that of my own knowledge. I done most of the work myself individually; it was in the spring of 1887. The water for the water mains which I have spoken of came from about 1,000 feet up the side of the mountain, to the corner of block 22. Mr. Carter owned the water right.

57 Cross-examination of HENRY E. HOWES by Mr. GANAHL:

I know the premises in dispute here; they are the north half of block 22; I am certain of that. I know that Mr. Carter claimed to own, and I supposed he did own, the entire north half, and I supposed that was what was in dispute. I know *that* numbers of the lots in controversy on this north half, they are 2, 4, 6, 8, 10, 14, 16, 18, 22 and 24, they are 25 by 100. They fronted to the north on Cedar St. and run back 100 feet to what is an alleyway now; the alleyway is 25 feet wide. I first became acquainted with the premises in controversy in the spring of 1886, along in July. I was made personally acquainted with them in July, because I had occasion to go around this block for the purpose of picking it out as a block for Mr. Carter. When Mr. Carter was in Portland in the spring of 1886, he authorized me to designate some block until he could get back. He did not inform Col. Wallace before he left to go to Portland that I would designate the block. I did go back and pick out this block, provided it was satisfactory to Mr. Carter,

when he returned. This was in August, I think. I said I went around the block in July, I mean in August instead of July; I was in Portland in July. I did this as the agent of Mr. Carter. With reference to taking possession of this block, I cut some timber off of it for saw-mill use in August; I cut but a very little off of that Carter block. I did that as the agent of Mr. Carter. I took possession of that block in August, 1886, as the agent of Mr. Carter, with the understanding that if Mr. Carter was satisfied with that block, he was to have it. This deed "Exhibit C," was executed at the time of picking out this block, or shortly afterwards. I did not take possession of the block any more than to designate that block as the one Mr. Carter would want. I cut logs off of it after the mill was running, some time during the summer. I said I might have cut a few off that corner block in August. I said I picked the block out before the deed was executed. I never entered into possession particularly for Mr. Carter, any more than picking it out for him provided he was satisfied; then the deed was signed by Mr. Wallace for Walter Bourke. I commenced cutting timber off of this block some time after the mill was put up; I could not tell exactly when I did cut the timber; I think I cut some in August. I don't know exactly when that deed was delivered to me for Mr. Carter; I don't think it was delivered to me for Mr. Carter; I was there as his agent; I had no place to keep the deed. It might have been delivered to me, but I handed it back to Mr. Wallace. I don't think I entered into possession of this block for Mr. Carter about the 31st of July, 1886, as his agent. I remember testifying on a former trial here, in which Mr. Carter was plaintiff and certain parties were defendant, with reference to certain property on the south half of that block. I think in that case I did testify that I entered into possession some time about the 31st of July, 1886, for Mr. Carter. I picked the lot out about the 31st of July for Mr. Carter as his agent. I picked the lot out; I did not think it was
58 necessary to hold it for possession, because he was going to make a deed out for Mr. Carter for him. I did enter into possession of this block on the 31st of July and prior to the execution of the deed from Mr. Wallace, as agent for Walter Bourke, to Mr. Carter, if that is what you call possession. I picked those lots out, and I so testified. I did not understand it was necessary for possession, as Mr. Carter was to have a deed of it as soon as he came back, and I picked the lot out before the deed was executed. What I testified to on the former trial was not incorrect. If picking the block out makes possession, then I took possession of it. I intend my testimony now to be the same as it was then. After Mr. Carter received the deed I went at it to clear off the block. I commenced cutting timber on the 31st of July, promiscuously anywhere in the town; cut a little off of one corner of the block, but the most timber was cut close to the mill. My object in cutting timber indiscriminately was because Mr. Carter had bought it from Mr. Wallace; all the timber on these lots, too, bought the whole thing. Mr. Carter's object in buying the timber was to supply the mill; that was my object in cutting it down. The object of supplying the mill was to

manufacture lumber out of it for building purposes, and also for sale. Mr. Carter bought the timber about the same time the block was purchased; he was to pay one dollar a thousand for the timber as it stood; it was to be scaled at the mill. The size of the trees on the lots in controversy were from 18 inches to 3, 4 and 5 feet in diameter; there were some poles, and some brush; did not carry those to the mill. All that was used for logs was from 18 inches up. Three-fourths of the timber on these lots in controversy was very large, the other ¼ consisted of smaller trees, from 18 inches down. There was very few of these poles, from 8 or 10 inches through. They were cedar trees, and there were probably one or two fir trees on the entire block. This timber was all cut down; I don't think there was any trees left standing. There was one or two stubs left standing. When I picked this block out it was a dense cedar grove. I don't think that I ever heard it called Black Forest, I heard it called "The Swamp." The northeast corner of lot 24 was pretty swampy. I don't think it was very swampy on 18th or 19th of February, because it was frozen up. I was over the northeast corner a great many times, prior to the bringing of this suit; I can't say just exactly when. It was in the summer time. I know it was swampy. My object in going there was cutting the timber and cleaning up the entire block; the northeast corner as well as the other, including lots 22 and 24. I was there in the summer of 1886, 1887 and 1888. I don't know what I was around there for in 1888; I was clearing it off in 1887. I do mean to tell the jury that that portion of the block was cleared. I know positively that 150 cords of wood were not cut there after this so-called jumping; I know there was no 150 cords of wood cut on that block; I am positive of it. I know it because I was there all the time since 1886, and there was no timber cut off of it. I was the agent of Mr. Carter at the time of the commencement of this action. Mr. Bell was working for Mr. Carter; he swears to the complaint. Mr. Carter had two agents. Mr. Bell is in
59 the court-room. I was not doing anything particularly on the 19th of February; I was Mr. Carter's agent then. I was not locating a block then on that day. My partner, Mr. King, located two lots; I don't think he put my name to them; I don't think he signed it King & Howes. I was attending to my business on the 19th of February. The night of the 19th of February, I was locating lots in the town of Wallace; I wrote quite a number of notices. I don't think any of the notices I wrote were posted on this block. I think the notices were put up by my partner. I think they were signed H. G. King, I would not be certain. I think I told him to go and locate these lots. I did not write the notices for him; I don't think I so testified on the former trial. I would not swear positively that I did not write the notices. I do not remember exactly how many lots I located on the 19th of February. When Mr. Carter and I first went there in the spring of 1886, Mr. Carter was looking for a place to go into business—any kind of business that came up. He was not looking for the business of sawing up timber. He is an old saw-mill man and old lumberman, and

so am I. He was attracted by this dense growth of cedar timber afterwards. When he first came he had no idea of putting up a saw-mill. The idea first got into his head when he made arrangements with Mr. Wallace. It was before he commenced clearing up. It was in June when I first went there. Mr. Carter had to put in a saw-mill; that was the consideration; the way he got the block was he was to put in a saw-mill. I know a Sioux half-breed named Walter Bourke, but not personally; I have heard of him, from Mr. Wallace, in 1886. He showed me a power of attorney from Walter Bourke, and said that he had a power of attorney from Walter Bourke for locating and selling that town site of Wallace. He showed me a power of attorney from Walter Bourke to locate this ground; I did not read the power of attorney he read it to me. It was so long ago I could not remember much of the substance of the power of attorney, any more than he gave me to understand that it was a power of attorney—I can remember that much of it, but as to how it read I could not state; it was a power of attorney to locate and sell the town site of Wallace; I am positive of that. I think I would remember the power of attorney. (Paper shown witness.) I think this is the power of attorney he showed me. This is the power of attorney from which he read. I supposed it was by virtue of that power of attorney that Wallace signed this deed, "Exhibit C." (Deed shown witness.) I am a witness to that deed. It was signed in Mr. Wallace's office, in the town of Wallace; can't say exactly when that was; I think it was in the month of July. I can't say exactly as to the time, I should judge it was a month or more, may be less, after he showed me the power of attorney. I do not remember just the time I signed that deed. I do not think Mr. Wallace read to me from any power of attorney from Walter Bourke, authorizing him to locate and sell the town site of Wallace at the time I witnessed the deed. It was some time in the month of June
60 that he read to me the power of attorney, authorizing him to locate and sell. I don't know as to the power of attorney being to locate, but that was my understanding, that it was a power to locate and sell. I saw Col. Wallace when he signed this deed. I think he signed the name of Walter Bourke to it. (Witness looks at the deed.) No, sir, it is signed "Walter Bouke," B-o-u-k-e. The name that was signed to the deed does not spell Bourke my way of spelling it; I think it is not spelled the way it is in the power of attorney. The deed was delivered some time in the month of October; I say that because Mr. Carter did not get back to Wallace until about that time. I think the deed was delivered to me at the time it was made out, and I signed or witnessed it, and I think handed it back to him, as I had no place to keep it; but I would not say positively. It bears date the 31st of July, 1886. I suppose it was delivered to me as the agent of Mr. Carter. I do not know whether the $600 consideration was paid then or afterwards. I am pretty positive the deed was delivered to me as the agent of Mr. Carter. I said in my direct examination I did not think I had the deed. I know it was not delivered to Mr. Carter until he came back from Portland, I think I so stated. The deed

manufacture lumber out of it for building purposes, and also for sale. Mr. Carter bought the timber about the same time the block was purchased; he was to pay one dollar a thousand for the timber as it stood; it was to be scaled at the mill. The size of the trees on the lots in controversy were from 18 inches to 3, 4 and 5 feet in diameter; there were some poles, and some brush; did not carry those to the mill. All that was used for logs was from 18 inches up. Three-fourths of the timber on these lots in controversy was very large, the other ¼ consisted of smaller trees, from 18 inches down. There was very few of these poles, from 8 or 10 inches through. They were cedar trees, and there were probably one or two fir trees on the entire block. This timber was all cut down; I don't think there was any trees left standing. There was one or two stubs left standing. When I picked this block out it was a dense cedar grove. I don't think that I ever heard it called Black Forest, I heard it called "The Swamp." The northeast corner of lot 24 was pretty swampy. I don't think it was very swampy on 18th or 19th of February, because it was frozen up. I was over the northeast corner a great many times, prior to the bringing of this suit; I can't say just exactly when. It was in the summer time. I know it was swampy. My object in going there was cutting the timber and cleaning up the entire block; the northeast corner as well as the other, including lots 22 and 24. I was there in the summer of 1886, 1887 and 1888. I don't know what I was around there for in 1888; I was clearing it off in 1887. I do mean to tell the jury that that portion of the block was cleared. I know positively that 150 cords of wood were not cut there after this so-called jumping; I know there was no 150 cords of wood cut on that block; I am positive of it. I know it because I was there all the time since 1886, and there was no timber cut off of it. I was the agent of Mr. Carter at the time of the commencement of this action. Mr. Bell was working for Mr. Carter; he swears to the complaint. Mr. Carter had two agents. Mr. Bell is in
59 the court-room. I was not doing anything particularly on the 19th of February; I was Mr. Carter's agent then. I was not locating a block then on that day. My partner, Mr. King, located two lots; I don't think he put my name to them; I don't think he signed it King & Howes. I was attending to my business on the 19th of February. The night of the 19th of February, I was locating lots in the town of Wallace; I wrote quite a number of notices. I don't think any of the notices I wrote were posted on this block. I think the notices were put up by my partner. I think they were signed H. G. King, I would not be certain. I think I told him to go and locate these lots. I did not write the notices for him; I don't think I so testified on the former trial. I would not swear positively that I did not write the notices. I do not remember exactly how many lots I located on the 19th of February. When Mr. Carter and I first went there in the spring of 1886, Mr. Carter was looking for a place to go into business—any kind of business that came up. He was not looking for the business of sawing up timber. He is an old saw-mill man and old lumberman, and

so am I. He was attracted by this dense growth of cedar timber afterwards. When he first came he had no idea of putting up a saw-mill. The idea first got into his head when he made arrangements with Mr. Wallace. It was before he commenced clearing up. It was in June when I first went there. Mr. Carter had to put in a saw-mill; that was the consideration; the way he got the block was he was to put in a saw-mill. I know a Sioux half-breed named Walter Bourke, but not personally; I have heard of him, from Mr. Wallace, in 1886. He showed me a power of attorney from Walter Bourke, and said that he had a power of attorney from Walter Bourke for locating and selling that town site of Wallace. He showed me a power of attorney from Walter Bourke to locate this ground; I did not read the power of attorney he read it to me. It was so long ago I could not remember much of the substance of the power of attorney, any more than he gave me to understand that it was a power of attorney—I can remember that much of it, but as to how it read I could not state; it was a power of attorney to locate and sell the town site of Wallace; I am positive of that. I think I would remember the power of attorney. (Paper shown witness.) I think this is the power of attorney he showed me. This is the power of attorney from which he read. I supposed it was by virtue of that power of attorney that Wallace signed this deed, "Exhibit C." (Deed shown witness.) I am a witness to that deed. It was signed in Mr. Wallace's office, in the town of Wallace; can't say exactly when that was; I think it was in the month of July. I can't say exactly as to the time, I should judge it was a month or more, may be less, after he showed me the power of attorney. I do not remember just the time I signed that deed. I do not think Mr. Wallace read to me from any power of attorney from Walter Bourke, authorizing him to locate and sell the town site of Wallace at the time I witnessed the deed. It was some time in the month of June
60 that he read to me the power of attorney, authorizing him to locate and sell. I don't know as to the power of attorney being to locate, but that was my understanding, that it was a power to locate and sell. I saw Col. Wallace when he signed this deed. I think he signed the name of Walter Bourke to it. (Witness looks at the deed.) No, sir, it is signed "Walter Bouke," B-o-u-k-e. The name that was signed to the deed does not spell Bourke my way of spelling it; I think it is not spelled the way it is in the power of attorney. The deed was delivered some time in the month of October; I say that because Mr. Carter did not get back to Wallace until about that time. I think the deed was delivered to me at the time it was made out, and I signed or witnessed it, and I think handed it back to him, as I had no place to keep it; but I would not say positively. It bears date the 31st of July, 1886. I suppose it was delivered to me as the agent of Mr. Carter. I do not know whether the $600 consideration was paid then or afterwards. I am pretty positive the deed was delivered to me as the agent of Mr. Carter. I said in my direct examination I did not think I had the deed. I know it was not delivered to Mr. Carter until he came back from Portland, I think I so stated. The deed

was not acknowledged at the time it was delivered to me as the agent of Mr. Carter. I know the consideration of this deed, it was $600, and other considerations, the $600 was not the sole consideration. The other consideration was that he should bring in a saw-mill and store and build a hotel on the town of Wallace; that was done within 30 days afterwards—done about the 1st of August or last of July, when the saw-mill was landed there. The saw-mill was brought in and paid for; the bill of goods was brought in, which was a part of the consideration; and the store was built. It was not built right away, but shortly after it was—as soon as the lumber was manufactured. The hotel was built as soon as the lumber was manufactured. He paid one dollar a thousand for the timber. He paid for the land, and besides that paid for all the merchantable saw-logs on it. The logs were to be paid for when scaled; they were scaled at the mill just before they were manufactured; I attended to the scaling. It is pretty hard to tell how much merchantable lumber came off of the ground embraced in the deed, because I did not scale the lots separately, and do not know how much came off. He paid a dollar a thousand for the lumber growing on the block. I do not know how much he paid for what came off of the block, because I do not know how much came off exactly. The store was not put up on any part of the land embraced in that deed, it was put up on lot 6, block 21; the mill was put up on block 28; Mr. Carter did not buy block 28 from Mr. Wallace; the Carter house was put up on block 21, in the summer of 1886; that is, part of it was put up in the summer of 1886, and the balance in 1887. The felling of these trees was indiscriminately all over the town site and the lumber hauled to the mill. The Carter house stands south two streets and two half blocks from the ground in controversy. I do not wish the jury to understand that Mr. Carter enclosed this entire block with a sidewalk. I presume Mr. Carter built it because he owned the block and improved his
61 own property. I do not know whether that sidewalk was built for the purpose of enclosing this block or any part of it. I was the agent for Mr. Carter; I superintended the building of a part of both parts of this sidewalk. The sidewalk built on the north side was built in 1888, some time in the spring, I think it was in June. The sidewalk on the west side of this block was built before that on the north side. The building is on lot 20. The sidewalk leads from the building or house on lot 20 to the corner of Cedar and Sixth, and connects with the sidewalk on Sixth; I could not swear that the object in building that sidewalk from lot 20 to the corner was for the purpose of furnishing a footway or pathway for the occupants of that house, whoever it might be. I do not think Mr. Carter would have built that sidewalk if he had not owned the block. There was a sidewalk built on the south side from the building that had been erected there by Mr. McKissick. That was on lot 5; that lot had been sold to Mr. McKissick by Mr. Carter. Mr. Carter furnished the lumber to build the sidewalk from McKissick's building to the southwest corner of block 22; I know because I delivered it to Mr. McKissick. I do not know that the sidewalk was

built by Mr. Lane, who was then occupying Mr. McKissick's building, or that it was built by Mr. Baldwin for Mr. Lane. I swear Mr. Carter furnished the lumber for that sidewalk. I mean manufactured and owned the lumber, and ordered me to deliver it to Mr. McKissick, and I did deliver it to him. Mr. McKissick ordered the lumber and I delivered it. I do not know that Mr. Baldwin came and got the lumber; or that it was furnished from that yard under his management or under his direction. I know Mr. Baldwin; he is a carpenter. The sidewalk was a four-plank sidewalk laying lengthwise, and measured four feet in width—four planks in width. It laid from the corner of Mr. McKissick's building 50 feet. I don't know who performed the actual manual labor of building; I don't think I saw him build it. There was no sidewalk running east on the south line of that block from McKissick's building, and no fence. There was no enclosure or any sidewalk on the east side of the block. On the north side of the block from lot 20 to the northeast corner was not enclosed in any manner, that I know of. I think the northeast corner of block 22 is on a high piece of ground; just a little ways west of the corner there is a swale running across the corner. The sidewalk from McKissick's building to the corner of Sixth and Bank St. was built in the fall of 1887, I think. The sidewalk on the west side was built in 1887, some time about the first of December. I don't remember whether the sidewalk was built before the railroad came in there. I don't think it was built for the purpose of furnishing pedestrians ready means of access from the Carter house to the depot. There was no sidewalk built from Arment's to the depot at that time. I say the sidewalk built on the west side of block 22 was built before there was any other sidewalk built in that town; that was the first. The sidewalk was built across the line of the alley, which is the south boundary of the lots in controversy; it stopped at the corner of Sixth and Bank
62 St. There was another sidewalk continued on the other side of Bank St. to the Carter house or Hotel St. The one on the west side of block 22 was built first, and then it was continued right on to the Carter house. This water brought into the town that I have testified to was in 1888, early in the spring; there was some water brought in in the fall of 1886. I don't know whether this water was brought there with mains for the purpose of improving block 22, or if the purpose of the construction of that water main was for the purpose of enabling Mr. Carter to sell water indiscriminately to the inhabitants of the town of Wallace. I did not have anything to do with the construction of the water main. Mr. Carter built or engineered it. It was not all constructed when Mr. Carter left in 1888; Mr. Bell superintended it after he left. They are still building water mains. I am acquainted with Ruddy, Murray, Robbins, Donnelly, and Mr. Stevens; don't think I am acquainted with C. M. Patterson. I know a Patterson, but I don't know if he is the one referred to in this complaint. The parties I saw upon the ground was Mr. Ruddy and Mike Murray; saw Mr. Robbins there also; am positive of that. Mr. Ruddy had a notice on the corner lots, 2 and 4. On the 19th of February lots 2 and 4

were not enclosed with a fence, there was no building upon them. I saw Mr. Ruddy upon them. He was walking around warming. I saw him doing nothing particular that night, any more than standing around and warming; I did not see his notice until the next day, the 20th. It was nailed on a board, I think, set up somehow—I think on a stump. My object on going on lots 2 and 4 that night was, I was looking around to see who was holding lots; that is about all the object I had. I did not go there in the company of Peter Porter for the purpose of locating these very lots myself, and found them already located by Mr. Ruddy. I did not go there for that purpose. I don't remember whether I saw Mr. Ruddy there when I first went there or not. I went by those lots three or four times that night. I don't remember that I was there on the afternoon of that day. It was not my object on going on those lots 2 and 4 on February 19th to locate them myself, nor of having them located. I did not have a notice written out for that purpose—never did. Mr. King is my partner. I swear Mr. Ruddy took possession of those lots 2 and 4 on the 19th. When I saw him there he had a notice, and he told me he had taken them. There was no enclosure there on the night of the 19th. I do not remember that I saw anybody on lots 6 and 8 on that night. I only saw Robbins warming by the fire on the night of the 19th, on lots 2 and 4. I did not see Mr. Donnelly, Mr. Stevens or Patterson there that night. I did see Mr. Murray on that corner, lots 2 and 4. He had a shotgun in his hand. It might have been a rifle, but I think it was a shotgun; I won't swear to that, but I am sure he had a gun. I did not have a pistol on my person. The time I saw Murray standing around the fire with a shotgun, there were three or four men there; I could not mention their names; Mr. Murray was talking to me—or I was talking to Murray rather. I think Mr. Robbins was there, for one
63 man; I could not see whether Ruddy was there or not. I don't remember seeing Donnelly there. Stevens was not there; I don't know Patterson. This man Murray was not fencing the lot with a gun. He told me he was going to hold that piece of ground with it. He appeared to have possession just at that time. I was the agent of Mr. Carter; I did not order him off. He told me he intended to hold it with a gun. I was standing on the sidewalk at that time. The lots I referred to being worth $10,000 to $12,000 are lots 2, 4, 6, 8, 10, 14, 16, 18, 22 and 24, to the best of my judgment. I based my judgment upon what I know Mr. Carter was offered for one of the lots a year or two before, and upon what property was worth generally in the town. I did not predicate the value of all of them upon what he had been offered for one of these lots. I do not know of any sales of real estate in the town of Wallace at that time, April, 1889. Lots were not selling very well at that time. These lots did not have any market value at that time; under the condition they were in they did not. If you would throw off the litigation they would have a market value. They were of good value if they had been out of litigation. They did not have a good value on account of the litigation. I do not know that the town site company were offering lots on the opposite of Cedar St. for $200 and $250 apiece.

I do not know that lots 22 and 24 had no value. I know these corner lots, 22 and 24 and consider them pretty valuable. I don't know just when they were located. I know they were not worth as much as the other end of the block. I think Mr. Barnard took their photograph there; he is a photographer; resides in the town of Wallace. His camera was put up on the hill north of the Northern Pacific depot when he took that photograph. I first saw that picture some time in 1888. Not this particularly, but I have some of my own; I have a picture like this. I think Mr. Barnard took it in the spring of 1888; I could not tell the month. I do not think that is snow shown on the photograph. It might be frost; but I don't think there is any snow about it. I don't swear that it is not snow; I don't think it is; I don't think that is snow on the sidewalk; I don't know what month the picture was taken in; it was some time in the spring of 1888. I don't think it was taken in February; I think there would be more snow. My judgment is when that picture was taken the camera was in the neighborhood of 800 feet from block 22. I do not know exactly. I do not know how much the camera was elevated; did not see Mr. Barnard take the photograph and don't know the size of his camera. I know it was taken in 1888. The ground in controversy is visible on the photograph. Lot 24 would be 25 feet east of the building on lot 20. The corner of lot 24 on 7th St. is 50 feet from the building. (Witness points out the sidewalk testified to being on Sixth St. and says:) The sidewalk starts from the corner running up north to this corner; then it turns east to within 50 feet of this corner of the block—these are Mr. Carter's two buildings, they are on lots 12 and 20. (Witness points out the Carter house and the Heller house on the picture.) There
64 used to be a trail running across the block from the northwest corner to Mr. Carter's saw-mill. It run over to Bank street and from there to the Heller house; after going to the end of it they could turn back off the trail and go to the Heller house, but they would naturally go over the sidewalk. The trail did not lead from the northwest corner of that block across the block to the Heller house. The mill is not on the picture. The mill would be over the top side of that picture and east, on the left-hand side. That trail went to the mill across Bank St. The Heller house was on the other side of Bank St. Only such stumps were cleared off of these lots in controversy as were burned up in burning the log heaps; there were some stumps burned off of lots 2 and 4; I think there were some on lots 10 and 14; there were some on 16. There was no down timber left there, only a very few brands or pieces of logs that did not burn. I could not tell you how close the stumps were left. The stumps were of the size of 18 inches to 2, 3 or 4 feet. When I first became acquainted with these lots in controversy, the block had been surveyed off; the lots had not been surveyed. The corner stakes were all I ever saw, when I first went there. I don't think there were any stakes marking the lots there. I never notified Mr. Carter that the title to this town site was bogus, and the deed under which he entered was no account.

Redirect examination of witness HOWES:

Mr. King located two lots, 9 and 11, of this block, for the purpose of holding them for Mr. Carter. When I referred to the power of attorney to enter the land being shown me, I referred to this power of attorney that has been exhibited to me today. The mill was located on block 28, ground that Mr. Carter did not own, because the ground on block 28 was so thickly covered with timber; he got permission from Col. Wallace to locate it on block 28, which was high and dry ground. I built a part of the sidewalk from the southwest corner of block 22 to the Carter house in the fall of 1888. Cap. Humans paid me for the part of it that went across his lot. The reason property was not selling well during April, 1889, was because it was in litigation caused by the jumping of the entire town. Everybody knew Mr. Carter owned the land. I was present when Mr. Bell notified Mr. Stevens that Mr. Carter claimed the ground; Mr. Stevens was building a little house on one of these lots, and Mr. Bell came over and asked me to go over.

Mr. E. H. MOFFATT, being called and sworn as a witness on behalf of the plaintiff, testified as follows:

I reside in Wallace; I know the plaintiff; have known him since 1887. I am in the hardware business; have been engaged in that business in the town of Wallace since July, 1887. I know block 22 in that town; have been acquainted with the same since July 1887. When I first became acquainted with it there was a good deal of timber on it. I know the timber was all removed and burned up together, a good deal of it, in 1887.

65 The timber was all cleared off at the beginning of February, 1889. Mr. Carter's men did the clearing of it. There was a water main laid down along the south side of block 22 during the summer and fall of 1887, and the north side of block 22; I think the water main on the north side of block 22 was laid down in 1889, that is, on Cedar St. The water main on Bank St., adjacent to block 22 was laid in 1887, 250 feet of it, from Sixth St. to within 50 feet of Seventh St. It was laid by Mr. Carter. The timber was cut down and hauled away and burned up; there might have been a few scattering logs left on it. There was not any considerable amount of down timber, logs or brush left on the block on the 19th of February, 1889. I have knowledge of the value of real estate in the town of Wallace irrespective of the condition of the title, assuming that the title was good. I bought some property that year; in April, 1889, the ground in controversy here would be worth $10,000 or $12,000, with a good title.

Cross-examination of E. H. MOFFATT:

Property that had the town-site title that people had possession of had a value; property that was in the possession of jumpers did not have very much value. I derive my knowledge as to values from the fact that I bought property there during that year. I bought

after the 19th of February, in June. The lot I bought was on Cedar St., between Third and Fourth, three blocks away from this ground in controversy. I did not know that there was any rise in property during the summer of 1889, at the time I bought. Lots were very cheap that summer. It was lower the next summer, but has been increasing since. Lots that have been held for $400 by the town site company were sold for $25 after the jumping, because of the complication of the title. I had a contract for half of the stock of the town site company at the time of the jumping, but it was not delivered to me. I am not acquainted with the legal subdivisions of this block; don't know where lot 24 is. I am acquainted with the north half of the block. I know the boundaries of the block; but I am not acquainted with the legal subdivisions of it. I cannot point out lot 24. The lots face north and south on Cedar and Bank streets. There were 24 lots in a block. The northeast corner of the block is about 400 feet from my place of business. In going there from my place of business in 1889, you could go right straight across the block, there was no enclosure. There was a little draw running through there. I was at every corner of the block prior to February 19th, 1889—in 1887. The northeast corner was cleared off in the fall of 1887. There was one building there in the fall of 1887, on the third lot from the northeast corner; it was put up some time in October or November, 1887. There was a boarding-house there, and I boarded over there. I got there by going right across the block; did not go around this sidewalk. There was no sidewalk on Cedar St. that I know of at that time. I am not a member of that water company. I was a member of the water company from about the 1st of February, 1889, until some time the following year. Mr. Carter was the manager of the
66 water company. We put the mains in and Mr. Carter paid us for them. I could not tell whether Mr. Carter owned the water mains, or whether they were owned by the water company. I could tell who owned them at that time. I think the object of putting those water mains there was to supply water to the town of Wallace. There was a water pipe coming from that main that supplied our place of business, up Bank St.; it was laid up the south side of Bank St. The water main came down the mountain south of Bank St. I should judge a lot on the northeast corner would be worth $800 to $1,000 on April 12th, 1889. Lot 22 would be worth $800. Neither of these two last lots were enclosed with a fence in February, 1889. I should judge lot 18 would be worth about $800 on the 12th of April, 1889; it was not enclosed on the 19th of February to my knowledge. Lot 16 would be worth $800. I should judge lot 14 would be worth $800. I should judge lot 10 would be worth $1,000, it was not enclosed to my knowledge. I should consider these lots 2, 4, 6 and 8, taken together would be worth $6,000. Lot 8 would be worth $1,200; lot 6, $1,500; lot 4, $1,500; lot 2, $2,000; I cannot call to memory any sales in April, 1889; we paid $400 apiece for lots in 1887.

Examination of witness closed.

"Exhibit I," being notice of *lis pendens*, offered and received in evidence, and is as follows:

PLAINTIFF'S EXHIBIT "I" IN CAUSE No. 20.

In the District Court, 1st Judicial District, in and for Shoshone County, Idaho.

EDWIN D. CARTER, Plaintiff,
vs.
CHARLES RUDDY, CHARLES ROBBINS, MICHAEL MCMURRAY, Frederick A. Stevens, M. J. Donnelly, C. M. Patterson, John Doe, and Richard Roe, Defendants.

Notice of Lis Pendens.

To all to whom these presents may concern:

Notice is hereby given that there is now pending in the above-entitled court an action brought by the above-named pl'ff against above-named def't-. The object of said action is the recovery of the possession from def'ts by pl'ffs of all those certain lots or parcels of land situated in the town of Wallace, Shoshone Co., Idaho, and more particularly described as follows, viz: The north half of block No. twenty-two (22) in the said town as the said half block is marked and designated upon the town plat thereof, said north half of said block No. 22 being bounded on the north by Cedar street, on the east by Seventh street, on the south by an alleyway running through said block, and on the west by Sixth street, and being three hundred feet long in an east and west and one hundred feet wide in a north and south direction. Said action is also brought to recover of defendants the sum of ten thousand dollars damages
67 for the withholding of said property, and one thousand dollars damages the values of the rents, issues and profits thereof, and costs of suit.

WM. H. CLAGGETT,
Att'y for Pl'ff.

STATE OF IDAHO, }
County of Shoshone, } *ss:*

I, Barry N. Hillard, county recorder in and for said county, do hereby certify that the foregoing copy of *lis pendens* has been by me compared with the original, and that it is a correct transcript therefrom, as the same appears of record on file at my office and in my custody.

In witness whereof I hereunto set my hand and affix my official seal this — day of November, 1889.

[SEAL.] BARRY N. HILLARD, *Recorder,*
By F. H. GRIERSON, *Deputy.*

(Endorsed as follows:) Edwin D. Carter *vs.* Charles Ruddy *et al.* Notice of *lis pendens.* Filed April 12, 1889. Frank Tibballs, county recorder. Plaintiff's Exhibit I in cause No. 20. (Copy.) Filed Dec. 7, 1891. A. L. Richardson, clerk. Wm. H. Claggett, att'y for pl'ff.

D. C. McKissick, being called, sworn, and examined as witness on behalf of the plaintiff, testified as follows:

Examined by Mr. Allen:

I reside in Wallace; I have resided there since 1887; I am engaged in the wholesale liquor business. I am acquainted with the plaintiff and know the defendants Ruddy, Murray, Robbins, Donnelly, and F. A. Stevens, don't think I know Mr. Patterson. I know block 22 in the town of Wallace; also the north half of the block. I have known that piece of ground since 1887. When I first knew it, it was covered with stumps, principally stumps; the timber and logs, &c., upon it had been cut down and hauled off. Logs were drawn off of the block, and tops and pieces of logs were piled up around the stumps and burned. I could not say any stumps were entirely burned up. On February 19th, 1889, the timber had all been taken off of this block and the refuse was burned; whether it was all burned up clean I could not say, and whether every tree was off I could not say, but it was principally cleaned at that time. I saw Mr. Carter's men in his employ working on that block in 1887. The building on lot 20, that is the lot near the northeast corner, was built in 1887. The other house, I would not state whether it was built in 1887 or not; I know it was built in 1887 or 1888. I know the sidewalk on the west side of the block; that was built in the fall of 1887; I saw Mr. Carter there working, I suppose he built it. The sidewalk on the north side of this block was built in the spring of 1888; I don't know exactly what time. I saw the men working on that walk that were in Mr. Carter's employ. I
68 know who built the sidewalk on the south side of this block; I think it was built there in December, 1887. I had a house on lot 5 in that block, that is near the southwest corner, and at that time Mr. Carter was building a walk on Sixth St., on the west side and I told Mr. Carter if he would furnish me the material I would lay a walk connecting his with my house. He furnished the lumber and I had the walk laid down. I suppose I paid for the work of laying down this sidewalk; I don't recollect paying it, but then it was something I caused to be done. Mr. Carter gave me the lumber, he delivered the lumber, and there was no charge ever made of it to me. I think I am acquainted with the value of real estate in the town of Wallace independent of litigation. I have an idea in my own mind of what the lots 2, 4, 6, 8, 10, 14, 16, 18, 22 and 24 were worth on the 12th of April, 1889. I should call those lots worth, in the aggregate $1,000 apiece. I know Mr. Carter and I know that there were men working on that block that were in Mr. Carter's employ. I know of Mr. Carter building the sidewalks and his men clearing up the ground, burning brush and piling up rotten

logs. In the year 1888 there was a sort of a pavilion built by the Fourth of July committee on that piece of ground, the north half of block 22 near Sixth St. It was built with the understanding that if Mr. Carter would furnish the lumber gratis, when they got through with it they would take it down and pile it up and take care of it. That building or platform was 60 feet deep; it covered a portion of lots 2, 4, and possibly of 6; I could not say how deep the building was. I saw the lumber piled up there where the building stood, on a portion of this block; I could not say how long it remained there.

Cross-examination by Mr. GRANAHL:

I have stated that I have estimated the value of these lots at $10,000. That was not their value on the 12th of April, 1889; they did not have much value at that time. Without litigation, to the best of my knowledge, the land would be worth $10,000 at that time; provided there was no litigation. I do not know of any lots selling in Wallace during that month. I base this value the same as a man would base value upon the prospects of a town, the prospects of business and the demand, and all that; that is the way I judge upon the prospective value and the demand. I could not say there was any demand for town lots at that time; can't say as to the month of April; lots were in demand in that town a year before. I do not remember stepping up and paying the man I hired to build the sidewalk on the south 50 feet of this block; but I am in the habit of paying my bills and I suppose I did; I can't say who the man was that built is. I know Mr. Lane, he was a tenant of mine living in this house on lot 5; I do not know he had the sidewalk built. Mr. Lane was not my tenant at that time. I know Mr. Baldwin; I could not say whether he built it; I suppose I employed the party who did build it; I could not tell you who he was. I can swear Mr. Lane did not order it, because he was not in town then. I say this, that in the fall of 1887 I had that walk built there, and paid for it, and Mr. Lane
69 had nothing to do with it; I could not say whether Baldwin built it or not. That sidewalk was constructed by a plank running lengthwise, across from the corner of Sixth St. to the building I had on lot 5; the object and purpose of that sidewalk was for the affording passengers from my house a passageway to Sixth St. I could not say whether that sidewalk was there in 1889. I think the walk I built there was three planks wide—I would not be positive—laid lengthwise. I could not tell whether the sidewalk built by Carter on Sixth street was built before or after Mr. Arment had built his sidewalk from his hotel to the depot. I don't know whether the railroad had come in at that time or not. I could not state what was the object of building that sidewalk on Sixth St. I say these lots in controversy were cleared of the trees that were on the block; it was still full of stumps. I saw the timber when it was growing there; the trees were close together. The stumps were from 4½ feet in diameter down to very small stumps, from the size

of a whipstock up, small trees and large trees. The timber on this lot was principally heavy timber. The stumps were of the natural height, say from 2¼ to 4 feet; some higher, I think, I can't say exactly. I was there on the 19th of February, I saw the condition of these lots 2 and 4 on that night. I was there on that corner that evening; I did not go over for the purpose of locating these lots on the 19th of February; I am positive of that.

Examination of witness closed.

GEORGE MCLAUGHLIN, being called, sworn, and examined as a witness on behalf of the plaintiff, testified as follows:

Examined by Mr. ALLEN:

I reside in Wallace; I have resided there since April, 1887, with the exception of three months, about a year ago now. I am a boot and shoe maker by occupation. I am acquainted with Mr. Carter, the plaintiff in this action. I am acquainted with the defendants Ruddy, Robbins, Donnelly, Michael Murray, and Frederick A. Stevens. I don't know C. M. Patterson; probably I know him, but not by name. I know where block 22 is located. I have been acquainted with that land ever since I have been there. When I first came there the most of the timber was cut off and hauled off; there was some timber standing in the northeast corner of the block, I think, when I came there, there were some trees standing. I saw Mr. Carter's men working on the whole block in the course of the summer and fall of 1887; they were clearing it up into log piles and burning them. They were using a yoke of cattle, piling the logs up with them, and making them into heaps and burning them nights. I was there three different times and talked with one of the gentlemen who was burning the log heaps in the evening. I know the names of the men that were employed by Mr. Carter.

70 There was a gentleman by the name of Mr. Alderman; another by the name of Jenkins, and another named McDonald. They cleared this block up; piled the logs up into log heaps and burned them. I presume some logs were left on the ground that were not burned. I could not say how many logs were burned. I had the opportunity of seeing the clearing that was done on this block; I was passing there every day until February, 1889. I was in the camp all the time. My shop was situated on Bank St. maybe 200 feet away from this block. There were two buildings put up on this block; I presume they were put up by Mr. Carter. One of the buildings was put up in the fall of 1887; and the other one was put up next spring, in 1888. I do not know who built them. I think the sidewalk on the west side of this block on Sixth St. was put there in the winter of 1887, and the sidewalk on the north side of the block was put there the next spring. I saw Mr. Carter there as the work was progressing, and Mr. Bell. Mr. Bell was superintending Mr. Carter's business, or helping to do it. I know Mr. Robbins, one of the defendants. I had a conversation with Mr. Robbins in regard to this block. He came to me especially;

it was right after the jumping on the 19th of February, 1889. He wanted me to take an interest in the southwest quarter of the southwest two lots of the Carter block and wanted me to put up some money and help fence it. I asked him what lots he meant, and he told me, and I told him I would have nothing to do with Mr. Carter's property. I asked him if it was any part of Mr. Carter's block, and he said it was, and described the lots to me. I am talking about block 22.

Cross-examination of witness McLAUGHLIN:

The particular part of this block which this conversation referred to was the southwest corner of block 22; I don't know the lots by number. He spoke of two lots; he did not mention the numbers of them. I think I have detailed all the conversation.

Examination of witness closed.

Mrs. LUCY A. WALLACE, being called, sworn, and examined as a witness on behalf of the plaintiff, testified as follows:

I reside at present in Portland, Oregon. I resided in Wallace from June, 1885, to September, 1890; I am acquainted with Mr. Carter, the plaintiff in this action. During the time I was in Wallace I was postmistress, telephone agent, district mining recorder, and had a stationery store and lodging-house. I have known Mr. Carter since June, 1886. I am acquainted with Ruddy, Robbins, Michael Murray, F. A. Stevens, M. J. Donnelly, and am not acquainted with Mr. Patterson I am acquainted with the ground in controversy in this action. I have known that block particularly since June, 1886. At that time it was a dense forest. I know when this ground was purchased by Mr. Carter; it was in June, 1886; that is when the negotiations were made. Mr. Carter and Howes boarded at our house. Mr. Carter commenced clearing this block early in the month of August, 1886. The saw-mill got in there the last day of July. They com-
71 menced cutting off some of the timber for the saw-mill. They did some work clearing this block that year, but most of it the next year, 1887. They cut the trees that were suitable for lumber and hauled them off to the mill, and the balance they cut and piled up into log heaps and burned it in different parts of the block. My place of business was directly opposite this block, on the other side of the street, and I was in daily attendance upon my business, where I could see what was going on on this block every day in the week. My residence was just above this block, on the rise of ground at the head of Sixth St. on the point of the hill, overlooking this block. (Witness examines photograph marked Plaintiff's Exhibit "H.") I recognize that; that is a picture of the town of Wallace as it was at that time. That was taken in the year 1888; I should think early in the summer or late in the spring; I can see my residence on that picture. (Points it out to the jury.) There is the house where I lived, the dwelling-house right there; here is

the block in controversy; here is my place of business right across from the block in controversy. My store was 75 feet west of the block in controversy, and 120 feet south of my dwelling-house. Sixth St. ends right here. Here is a fence around here. This is one corner of block 22, and there is lot 19 where my store building was. From my place of residence I could overlook block 22. This block was cleared by Mr. Carter and his men nearly as well as it could be, unless the stumps had been sawed off close to the ground or pulled up with a team; of course there were some pieces of trees and like that left that failed to burn; the ground was damp and they did not burn up. Most of the clearing was done in 1887. There was some done before that, when they commenced to work for the mill, but I don't remember just what time. There was a great deal done after that, because the men made a thorough job of it, or tried to, when they were working at it. I know something in regard to the celebration for the Fourth of July in the summer of 1888. It was held on the north half of block 22, on the south half of lots 2, 4, and 6, block 22; this Fourth of July pavilion was there on the south half of the lots; there was another party got permission of Mr. Wallace to put up an ice-cream stand on the north half of the lots. I think that Fourth of July pavilion was originally intended to be 50 by 60 feet, and they found it was not large enough, and there was another addition put on, and a tent put over that part for the musicians, that is going further east; it would cover lots 2, 4 and 6. I know Mr. Carter constructed the two buildings on the north side of that block. The small building was constructed in the fall of 1887; that was on lot 20 and the one on lot 12 was constructed in the spring of 1888; it was a two-story building. (Witness returns again to the photograph.) That is a correct photograph of the town of Wallace in the summer of 1888. I know this block was taken possession of by the defendants Ruddy, Robbins, Murray, Stevens, Donnelly, and Patterson, but I can't say just which lots each one claimed. I was not over the block myself. I know Mr. Murray came to me and I know what he said about it.

72 He came to me and advised me to put a notice on my own lots where my store building was situated. I said it was not necessary, that I was living there and did not propose to have anybody take them away from me. He said, We have got away with the Carter block, and you had better look out for your ground. This was on the 19th of February, about 10 o'clock that night. I know I was up until one o'clock that night. I saw a fire on the northwest corner of block 22 that night; saw half a dozen men, perhaps, around the bonfire; I could not say just who they were, but I saw the bonfire on lots 2 and 4. I saw men with lanterns or brands on this block that night. They appeared to be going backward and forward over the north half of the block. It was between 9 and 10 o'clock, and from that on, all through the night, while I was up, they were all over the town. The whole town was lined with people.

Cross-examination of Mrs. WALLACE by Mr. VINEYARD:

This Fourth of July celebration took place on the Fourth of July, 1888. I don't think Mr. Carter was in town at that time. They had got permission from him to put the pavilion on this ground. I did not state that they got permission from Mr. Wallace, because Mr. Wallace did not claim the block; if I did I misspoke. I have known this ground ever since 1886. I have known the ground before that, but block 22 particularly since 1886, the latter part of June. My attention was particularly called to the block at that time. Mr. Carter and Mr. Howes came there with the view of investing. Mr. Wallace offered Mr. Carter a block of ground for a certain amount of money. He gave him his choice of 22 and 21. He designated block 22 at that time; that was in June. They did nothing just at that time with reference to block 22; it was a proposition that was open to Mr. Carter. They commenced to clear this block in August, just as soon as they got their mill up and in shape to work. They cut down some timber in August. They did not do very much else; the timber that was desirable for their use at that time they took. They did not proceed to clear any timber at that time. They proceeded to clear the timber the next year, when the timber was cut off. It could have been got into condition before that, but they were busy at that time putting up their store building and hotel, as they agreed to. I could not say as to the exact time when they completed the clearing of block 22. They did complete it with the exception of pulling out the stumps by the roots, or sawing them off close to the ground; except that a few pieces of logs remained after burning, they did not burn up entirely; these stumps were very thick; they were not so very high from the ground; I should judge none of them were as high as my head. There might have been some trees broken down on this block; if there were any, there were not very many. I did not see any brush on this block 22 in 1888, except some little brush growing, berry brushes, or something like that. I think there was more brush and down timber on the northeast corner of this block than any other part of the town, but there was not very much there. I know the number of the lots in this block. The lots on the northeast corner are
73 lots 22 and 24. There was not considerable timber standing there; it was rougher there and less cleared there than the west half of the block, on the west side. The north half of this block was cleared up in 1889. Compared with what it was when Mr. Carter took possession, I should call it cleared. The logs that were fit for lumber were hauled to the mill. I really could not say just what became of that lumber. Mr. Carter put up several buildings there himself, and I presume a good share of it went into those buildings. He did not put up any buildings on lot 22, on the north half of this ground in controversy. He did not fence the lots. I was attending to my business in the store on the night of the 19th of February, 1889, until nine o'clock at night. I was out of the store that evening. The post-office was closed after nine o'clock. Some one came rushing in to me and told me they were jumping

the town, and naturally I went outside. That was the first intimation I had about this town jumping. I did not go over to block 22 to see what was going on there, but I saw several men over there with lanterns. I could not say whether the defendants were there or not. I could not tell who was there. I was too busy attending to my own affairs to see who was there. I saw Mr. Howes that evening, in front of my store; did not see him have a lantern. I could not say that he was on this block or not. I did not locate any lots myself that night. Mr. Harris came down to me, and I called him, and asked him to put notices on my two lots below my house to protect myself. Those lots were covered with down logs, stumps and brush; no fence around them and no buildings on them. I paid for those lots afterwards and have a deed for them, and I am in possession of them now. I did not want anything that I did not pay for.

Examination of witness closed.

W. C. HUMAN, being called and sworn as a witness on behalf of the plaintiff, testified as follows:

Examined by Mr. HEYBURN:

I reside in Wallace, Idaho. I am acquainted with block 22 in that town; have known that property since 1886; I was residing at Delta, 18 miles across the mountain, the first time I became acquainted with them. I was county commissioner at that time. I had occasion to visit the town of Wallace during that time almost every month, for two months, anyway. I was also engaged in the mercantile business. I know the condition of block 22 in 1886; and all of that country there. In 1886 it was a dense forest of heavy timber. In 1888, it was all cleaned off except the stumps. In 1887 I went there to build. In the latter part of March or April, I built right across the corner from block 22, on Bank St. I am not familiar with the photograph, and cannot point out the buildings on it. In 1887, when I went there to build, I wanted some timber to make posts to put under the house, and I went onto this block 22 to see if I could get some down timber to make posts, and I could not find any. I found quite a lot of logs lying there that was not burned up, but none that would suit to make posts.
74 That, I think, was in April, 1889, I went up there. I built in 1889. I never was on the ground in 1887 and 1888, but I saw the timber cut off; I saw the stumps there. I know the value of property in the town of Wallace in the month of April, 1889. I think the lots in controversy would be worth at that time $9,000 or $10,000.

Cross-examination by Mr. VINEYARD:

My knowledge as to value is based upon the country, the mines, and the location of the town, and the general country. I do not think my value is based upon prospective value. There was quite a good bit of building that spring, and if a man had title to the

property he could have sold it for a good price. I don't know of any property being sold in that town up to the 12th of April, 1889. I know the value of lots at that time; I was trying to buy some. I did not buy until May or June. The lots I bought were on Bank and Fifth streets; I paid $300 for two lots; I bought them from two parties, from the jumper and the town site, and I was not to pay either one of them until the lawsuit was settled. I do not know the highest-priced lots that were ever sold up to the 12th of April, 1889. I have no knowledge as to the value of town lots in Wallace only what I have stated. I became acquainted with the north half of block 22 in February, 1887. I went over to buy some property and was looking at all this property. I offered to buy the northwest corner from Mr. Carter or Mr. Howes, I won't be sure which, at the Carter house. I was constantly acquainted with that block from that time on. I was over there every little while, every two or three months. I saw Mr. Howes there every time I went to Wallace after that. He was general-merchandising. I do not remember his doing anything with regard to block 22. I applied to him to buy some property; that was in 1887. I never saw that photograph until I saw it here. I think it is a correct representation of the town of Wallace, I could not tell.

Redirect examination by Mr. HEYBURN:

I saw Mr. Howes there in November, 1887.

Examination of witness closed.

GEORGE I. BELL, being called and sworn as a witness on behalf of the plaintiff, testified as follows:

Examination by Mr. ALLEN:

I reside in Tekoa, Washington, at present. I first went to Wallace in 1887, about the 24th or 27th of March; left there in November of the same year, and returned again in March, 1888, and lived there the most of the time until within the last year. I know Mr. Carter, the plaintiff, and Mr. Ruddy, Robbins, Murray, Stevens, and Donnelly, defendants. Am not acquainted with Patterson, I have seen him. I have known Carter since 1869. I am acquainted with block 22 in the town of Wallace; have known it ever since I went there in 1887. In the season of 1887, I was in the store with Howes and King, and did some work for Mr. Carter, in the
75 way of building a hotel. In the spring of 1888, I went there to keep his books, and look after the hotel and business generally. Mr. Howes was also assisting me in looking after Mr. Carter's business. When I first saw block 22 in 1887, the standing timber was mostly all cut off; it was covered with down timber and tree tops. During the summer of 1887, Mr. Carter had been at work on there at different times clearing up the logs and burning them, for the purpose of clearing the block off. This block, especially the north half, was quite generally cleared; the stumps—a great many of them—remained, but the logs were rolled up around

the stumps, as a general thing, and burned as close to the ground as they would naturally burn; there was some pieces of logs that were left that did not burn. After they cleared it, it was in good shape, with the exception of some stumps on it. It had been cleared off. After this block was cleared, it was distinguished from the adjoining country on the east and north by its being cleared, and walks around it; immediately east of this ground, in 7th St., and east of 7th St., the greater portion of the standing timber was cut off, but the fallen timber and the tops all remained there on the greater portion of it. The difference between the block and the country east of it was very easily distinguished—the block was cleared off, and the other was not, it was cleared to the line. You could distinguish the block from the country north of it by its being cleared; there were standing trees left in the street. The sidewalk on the west side of the block was built after I went home the first season, the sidewalk on the north side of the block was built, I think, in the last of March, 1888; I helped build it myself for Mr. Carter. Mr. Carter furnished the lumber, I did part of the work, with others. It was shortly after I came back. The sidewalk was constructed from the northeast corner, running east to within 50 feet of the northeast corner. I kept books for Mr. Carter at that time. I have an account in those books with regard to lumber that was used in the construction of this walk on the north side of this block. It is on page 198 of the day book, under date of March 26th, 1888, in my own handwriting; that is a book of original entry. The charges were made at the same time, or within a day or two after the furnishing of the lumber. The lumber is charged on these books to block 22; I charged it by direction of Mr. Carter. (Witness reads the items on that account as follows.) "Block 22, Dr. to 38 pieces 4 by 4, 16 feet, 810 feet; 3,000 feet six-foot 2-inch plank; 40 lbs. of spikes for the barn; 28 lbs. from H. & K.; ¾ day's team-work, $4.50; 3 days' work by Smith, $7.50; one day by Wilson, $4.00; half a day by Atley, $1.50; one-half day by Johnson, $1.25; ½ day by Neil, $1.25; ½ day by Bell, $2.00; ½ day by Gable, $2.00." In all, the labor amounts to $24; nails, $5.00; the plank, $95.25. (A notice is here exhibited to the witness.) I signed that notice for Mr. Carter. I served that notice on the 27th day of February, 1889, by leaving a copy in a building the defendants were putting up. I went to serve it on Ruddy, and he refused to take it, and I laid it down where he was working and went off.

76 Paper offered in evidence by the plaintiff and marked "Exhibit J" for identification.

Objected to by defendants as incompetent, irrelevant and immaterial. Objection sustained; to which ruling of the court the plaintiff excepted.

"Exhibit J" is as follows, to wit:

PLAINTIFF'S "EXHIBIT J."

WALLACE, IDAHO TERRITORY, *February* 27, 1889.

To Charles Ruddy and M. Murray:

You are each notified that you are unlawfully trespassing upon lots 2, 4, 6, and 8, in block 22, in the town of Wallace, Shoshone county, Idaho Territory; that said lots belong to me by regular grant, and I am entitled to the possession of the same by reason of occupation and improvement. You are therefore commanded to vacate said premises, or you will be ejected according to law.

E. D. CARTER,
By G. I. BELL.

TERRITORY OF IDAHO, }
County of Shoshone. }

I, G. I. Bell, upon my oath depose and say that I am the agent of the above-named E. D. Carter, that he is a non-resident of this Territory, and I have sole charge of his property and business in the above county; that on the 27th day of February, 1889, I personally served upon each of the above parties, Ruddy and Murray, a copy of the above notice and on the above-described premises, in the said town of Wallace.

GEO. I. BELL.

Subscribed and sworn to before me this 27th day of February, 1889.

[SEAL.] W. R. WALLACE,
Notary Public.

Endorsed as follows: E. D. Carter *vs.* Ruddy and Murray. Notice to vacate lots in block 22. Plaintiff's "Exhibit J" offered in evidence and rejected by the court. (Exception entered.) Filed Dec. 8th, 1891. A. L. Richardson, clerk.

The witness continues: I was in the town of Wallace on the night of the 19th of February, 1889. I posted five notices on this block 22 after the 19th of February, 1889, and before the defendants had built any fences around it. Posted one notice on the northeast corner; one on the northwest corner, on a stump or burnt stub, it was near the line of lots 2 and 4, standing about the center line north and south; one on the southwest corner, and one on the northeast corner, and I think one on the north, about the center of the block.

Q. Whose name, if any, did you sign to that notice?

Counsel for defendants object to going into the notice any further which refers to an entry subsequent to the entry of the defendants.

Objection sustained, to which ruling of the court the plaintiffs except.

77 The plaintiff's counsel here offered to prove that immediately after the 19th of February, 1889, and before the defendants had made any inclosure upon the ground in controversy, or any improvement upon it whatever, that the witness Bell, as the agent of Mr. Carter, posted five notices upon block 22, three of which were upon the north of the block, and that that notice forbade anybody from trespassing upon any part of this block and notified them that it was owned and claimed by Mr. Carter, the plaintiff in this action; also to show that the notice was destroyed, and that the copy of it was also destroyed in the fire of the town of Wallace.

Counsel for defendants object to the offer, as incompetent, immaterial, and irrelevant.

Objection sustained, to which ruling the plaintiffs duly excepted.

Cross-examination of Mr. BELL by Mr. VINEYARD:

I now reside at Tekoa, Washington. I was first in the town of Wallace in March, 1887; I stayed there then until the last days of November, I think, the 27th of November. I was in the mercantile business part of the time, and part of the time assisting to build a hotel for Mr. Carter. I was in business for myself, in company with others; I was engaged part of the time in building the hotel and part of the time in merchandising. I came back to Wallace in March, 1888. After I returned, I was in the employ of Mr. Carter, keeping his books, running the hotel, and looking after his business generally, running the Carter house. I kept the books of the saw-mill, and lumber account. I think I was acquainted with the manner in which Mr. Carter employed his men in running his business around the saw-mill. These men were engaged in manufacturing lumber and other work he had to do. He got the logs for the saw-mill at various places. Don't know exactly where the logs came from. I first became acquainted with the north half of block 22 in the town of Wallace soon after I went there in 1887. There was some timber standing at that time on the northeast corner of the block, that would be on lot 24—I think the last lot in the block; it might have been on 22 and 24. I could not say how much standing timber was upon them at that time. Some of it was suitable for saw-mill purposes. When I first went there in 1887, portions of the north half of the block, except lots 12 and 20, was covered with down timber, logs and underbrush; that was in March. In November, 1887, it was pretty well cleared up. It was cleared of all the logs and brush; there were some stumps left. There was a few stubs, or trees broken off above the ground, six or eight feet high, perhaps four or five of them. There was a building on lot 20. There was no fence around any of these lots. There was no building upon lots 2, 4, 6, 8, 10, 14, 16, 18, 22, and 24. Some time in 1888 we erected a building on lot 12. With the exception of that building, the ground presented about the same appearance that it did in the fall of 1887, with the exceptions of the sidewalk. There were some more improvements on February 19th, 1889—I

refer to the sidewalks. The walk on the west side was built
78 while I was absent, about the last of November, 1887, between that and the last of March, 1888. There was 225 feet on the west side of the block built during that time, it was on the street adjacent to block 22. The sidewalk built in 1888 was on the north half; it was on Cedar street, right on the line of the block. That sidewalk commenced at the northwest corner and run east to within 50 feet of the northeast corner. It connected with the house standing over there on lot 20. The sidewalk ran to and stopped at the house. The sidewalk was constructed for the purpose of inclosing and improving the lots and block. The sidewalk is not continued around the block. There was no sidewalk on the east side. The sidewalk on the south side was extended 50 or 75 feet; don't know who built it. I think it was built in 1887. The sidewalk in front of the building was eight feet. The planks were laid lengthwise, 50 feet from the corner, I think, three planks in width; part of that sidewalk might have belonged to Mr. McKissick; the eight-foot walk was in front of his building. McKissick pretended to own it, I suppose he did. I don't know what the sidewalk was put there for. The remainder of the sidewalk was put there for the purpose of inclosing the block. That is on the west and north side. I told you this sidewalk on the south side, I thought, was three planks wide, about three feet wide, but I am not positive in regard to that. The sidewalk ran 50 feet from the southwest corner to McKissick's building. There was no building there at the corner; it connected there with the sidewalk west of block 22; that sidewalk extended north on the west side of the block 22 to the northwest corner of the block; there was no building there. There was no crossing there going north to the depot that I remember of. I don't think there was a continuation from that point called the Arment's hotel running north. I think there was a crossing from this sidewalk going toward the Carter house over to the next corner; it was a crossing two planks wide, or two sticks of timber; there was not a continuous walk over to the Carter house. In 1887, while I was there, there was no walks in either place. When I came back to Wallace, as I have stated, there was a walk on the west side of block 22, and a crossing across the southwest corner to the bank or near the bank; and some time during the summer of 1888, in May or June, there was a sidewalk built from the corner around opposite the Carter house, and there were planks laid across the street at that point. I know where the Heller house is situated; block 22 intervened between the Heller house and the depot. There was no footway crossing block 22 in 1887, when I went there, going to the Heller house, that I know of; you could go across the block there anywhere after it was cleaned up. People did not go across there over to the Heller house; there was a road or trail running from the northwest corner southeast to within about 75 feet of the southeast corner—went quartering across block 22 toward the mill, and came out on Bank St. about opposite, or a little to the east of Holly, Mason and Marks' hardware house. There was a

footpath over there. Nothing but this sidewalk deviated the
79 travel from going across there. People would go across afoot; it interrupted the wagon travel. I was there on February 19th, 1889; these lots were not fenced at that time. At that time there was no buildings on the north half of block 22, excepting on lots 12 and 20; the other lots were not fenced or built on. I first knew Mr. Carter in Wisconsin; came to the country with him. I am not the agent of Mr. Carter now. I am the individual that swore to that complaint. I was in Wallace on the 19th of February, 1889. At the time of the so-called jumping, I was at the Carter house.

Examination of witness closed.
Plaintiff rests.

Counsel for defendants offered on evidence petition for transfer of this cause; to which plaintiffs object- as incompetent to prove any issue in the cause. The objection is overruled by the court and the petition read in evidence to the jury; to which ruling the plaintiff by his counsel excepts.

The paper is marked "Defendants' Exhibit 1," and is as follows:

DEFENDANTS' "EXHIBIT NO. 1" IN CAUSE NO. 20.

In the District Court of the First Judicial District of the State of Idaho in and for the County of Shoshone.

EDWIN D. CARTER, Plaintiff,
vs.
CHARLES RUDDY, CHARLES ROBBINS, MICHAEL MCMURRAY, FREDERICK A. STEVENS, M. J. DONNELLY, C. M. PATTERSON, JOHN DOE, and RICHARD ROE, Defendants.

To the hon. the district court of the first judicial district of the State of Idaho in and for the county of Shoshone:

The petition of Edwin Carter, the plaintiff in the above-entitled cause respectfully shows to the court:

First. That this action was commenced on the 12th day of April, 1889, and that at the time of the commencement of this action the land and premises in dispute and sought to be recovered in said action were, and at all times since have been, and now are of the actual value of more than five thousand dollars ($5,000).

Second. That at the time of the commencement of said action the plaintiff was and at all times since has been and now is a citizen of the State of Wisconsin and that at the time of the commencement of said action each and all of the defendants in said action were and ever since have been and now are citizens of the Territory now State of Idaho and that at the time of the commencement of said action, each and all of said defendants were and at all times since have been and now are inhabitants of said Territory, now State of Idaho.

Third. Your petitioner further shows, that he claims title to said lands in dispute under a deed from one Walter Bourke a Sioux half-breed Indian who had previously entered the said land and
80 other premises adjoining the same at the United States land office at Cœur d'Alene, Idaho, by the location of Sioux half-breed scrip, issued to him under the act of Congress approved July 17th, 1854 and also claims title thereto under provisions of sections 2387 to 2389 inclusive, of the Revised Statutes of the United States and acts amendatory thereof, by reason of the fact that plaintiff was, at the time of the entry by defendants, and for a long time prior thereto, in the occupancy of said premises, and was and is the prior occupant thereof; while the defendants claim that the entry of said lands by said Bourke was illegal and void and also claim that the plaintiff is limited in his right to said lands by section 2382 of the Revised Statutes of the United States, and also claim that plaintiff cannot maintain this action because he has not complied with section 4556 of the Revised Laws of the Territory of Idaho. And your petitioner avers that the trial and determination of this action will involve the construction by the court of the said laws of the United States authorizing the issue and location of said Sioux half-breed scrip and also the construction of said sections of the Revised Statutes of the United States relating to town sites upon the public lands and as well the determination of the question of whether said section 4556 of the Revised Laws of the Territory of Idaho is or is not inconsistent with the laws of Congress governing the possession and disposition of the public lands.

Wherefore, by reason of the premises, your petition- says that this action is one of which the circuit court for the district of Idaho might have had jurisdiction under the laws of the United States, had such circuit court existed at the time of the commencement of this action and that under the act of Congress entitled An act to provide for the admission of the State of Idaho into the Union, approved July 3d, 1890, the circuit court for the district of Idaho has become the successor in said action to the said district court of the first judicial district of the Territory, now State of Idaho, and your petitioner therefore, prays and requests that all files, records and proceedings in this action or relating thereto be transferred to the circuit court of the United States for said district of Idaho, to the end that the same may be proceeded with therein in due course of law and your petitioner will ever pray.

WM. H. CLAGGETT,
GEORGE A. WITTER, AND
ALBERT ALLEN,
Attorneys for Petitioners.

STATE OF IDAHO, }
County of Shoshone, } *ss:*

Edwin D. Carter, being duly sworn says that he is the petitioner mentioned in the foregoing petition. That he has heard the said petition read and knows the contents thereof and that the same is true of his own knowledge.

EDWIN D. CARTER.

81 Subscribed and sworn to before me this 14th day of July, A. D. 1890.

BARRY *A.* HILLARD,
Notary Public.

(Endorsed as follows:) No. 20. 502. Edwin D. Carter *vs.* Chas. Ruddy *et al.* Petition for transfer filed July 14th, 1890. F. H. Grierson, clerk, by Barry *A.* Hillard, deputy. Filed April 7th, 1891. A. L. Richardson, clerk. Defendants' "Exhibit" No. 1 in cause No. 20. Filed Dec. 9th, 1891. A. L. Richardson, clerk.

Counsel for defendants also offered in evidence the letter decision of the Commissioner of the General Land Office canceling the entry of Walter Bourke, made under the Sioux half-breed scrip. Counsel for plaintiff object to the offer on the ground that it is incompetent, and immaterial, and because the letter shows upon its face to have been written subsequent to the date of the register's and receiver's receipt; and on the further ground that the Sioux half-breed scrip having been located on the land in controversy by the scripee, it passed the title in fee from the Government to Mr. Bourke, and that any action of any officer of the Land Department or Commissioner of the Land Office canceling the same would be incompetent, for the reason that he had no authority whatever to cancel it; and further, that the reasons stated in the paper offered for the cancellation of this entry was an erroneous conclusion of law by the Commissioner in this, that it assumes that the duplicate or copy of the scrip, as it had been previously located in Dakota, was scrip lawfully authorized to be issued, whereas there is no authority whatever in law for the issuance or location of a copy or duplicate of this scrip. And therefore the entry in Dakota was absolutely void, and cannot have the effect of canceling the entry in question.

The objection was overruled by the court, and the letter read in evidence; to which ruling the plaintiff duly excepted.

The letter is marked "Defendants' Exhibit No. 2" and is as follows:

DEFENDANTS' "EXHIBIT NO. 2" IN CAUSE NO. 20.

"C." DEPARTMENT OF THE INTERIOR, E. B. W.
GENERAL LAND OFFICE, A. M. H.
WASHINGTON, D. C., *June 11th*, 1889. J. P.

I, William M. Stone, acting Commissioner of the General Land Office, do hereby certify that the annexed copy of the press copy of a letter to R. and R. at Cœur d'Alene, Idaho, dated Jan. 24, 1887, in the matter of location by W. R. Wallace, att'y, of Sioux half-breed scrip No. 430—"C" issued to Walter Bourke, is a true and literal exemplification of the press copy in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed at the city of Washington, on the day and year above written.

W. M. STONE,
[SEAL.] *Acting Commissioner of the General Land Office.*
11—250

82 (Copy.)

DEPARTMENT OF THE INTERIOR, A. M. H.
GENERAL LAND OFFICE, M. E. N. H.
WASHINGTON, D. C., *Jan'y 24th*, 1887. F. J. P.
W. O. C.
F. G.

Address only the Commissioner of the General Land Office. 1886—68049.

Register and receiver, Cœur d'Alene, Idaho.

GENTLEMEN: I am in receipt of the register's letter of the 17th of June last, transmitting the papers in the location made June 5, 1886, by W. R. Wallace, attorney-in-fact, with Sioux half-breed scrip No. 430, letter C, issued to Walter Bourke upon a tract of unsurveyed land.

It appears from the records of this office that a duplicate of said piece of scrip has been issued by proper authority, and that the same was located March 9, 1880, by Henry T. Welles, attorney-in-fact, upon the south ½ of S. W. ¼ of section 29 t'p 125 N. R. 62 W., Dakota Territory, and that a patent for said tract was issued December 10th, 1881.

This scrip is not by law transferable, and any assignment or conveyance of the same is therefore void, and it is so stated on the face of each piece thereof.

The claim of the scripee against the Government, represented by said piece of scrip was satisfied when the Government gave him title to the land embraced in the location made with the duplicate piece of said scrip as above set forth; therefore the original of said piece of scrip is of no effect so far as the scripee is concerned, but belongs to the Government.

In view of the foregoing, I have this day canceled the location involved and retain the scrip in the custody of this office.

You will correct your records accordingly and notify the parties in interest of the contents of this letter.

The receipts of the register's letter of June 18, 1886, is acknowledged.

Very respectfully, S. M. STOCKSLAGER,
Ass't Commissioner.

(Endorsed as follows:) Defendants' "Exhibit No. 2," filed November 30th, 1891. A. L. Richardson, clerk. Defendants' "Exhibit No. 2," in cause No. 20, 1891. Filed Dec. 9th, 1891. A. L. Richardson, clerk.

Counsel for defendants offer in evidence the notice of R. E. McFarland, register of the land office, to W. R. Wallace, marked "Defendants' Exhibit No. 3."

Plaintiff's counsel objected to the introduction of the paper, for the reason that it bears date four months after the delivery of the deed by Wallace to Carter, under which Mr. Carter entered into possession and cannot affect the question of entering in good faith

under the deed; and further, that the letter is without
83 authority in law. Third, it is incompetent, immaterial and irrelevant. Fourth, it does not appear that Mr. Carter ever had any knowledge of the existence of such a letter, or that it was ever delivered or brought to the notice of Mr. Wallace or Mr. Carter.

Objection overruled; to which ruling counsel for the plaintiff duly excepted.

"Defendants' Exhibit 3" is as follows:

DEFENDANTS' "EXHIBIT NO. 3" IN CAUSE NO. 20.

(Copy.)

UNITED STATES LAND OFFICE,
CŒUR D'ALENE, IDAHO, *February 3rd*, 1887.

W. R. Wallace, Esqr., Wallace, Idaho.

SIR: This office is in receipt of a letter from the Hon. Commissioner of the General Land Office, bearing date of January 24, 1887, which states the location made by you as attorney-in-fact for Walter Bourke of Sioux half-breed scrip No. 430 C has been canceled and the scrip retained in the custody of said office for the reason that the duplicate of said scrip issued by proper authority was on the 9th of March, 1880, located by Henry T. Welles, att'y-in-fact upon the S. ½ S. W. ¼ sec. 29, t'p 125 N., range 62 W., Dakota Ty., and a patent issued for the same.

Very respectfully,

ROBERT E. McFARLAND, *Register.*

TERRITORY OF IDAHO, }
County of Kootenai, } ss:

I, Robert E. McFarland, register of the U. S. land office at Cœur d'Alene, Idaho, hereby certify that the foregoing is a true and correct copy of the original letter written by me to W. R. Wallace, February 3rd, 1889.

ROBERT E. McFARLAND, *Register.*

(Endorsed as follows:) Defendants' Exhibit No. 3. Filed Nov. 30th, 1891. A. L. Richardson, clerk. Defendants' "Exhibit No. 3" in cause No. 20. Filed Dec. 9th, 1891. A. L. Richardson, clerk.

Counsel for defendants offers in evidence power of attorney from Walter Bourke to Mr. Welles, marked "Defendants' Exhibit 4."

Counsel for plaintiff object to the offer as incompetent, irrelevant, and immaterial. As being incompetent as tending to prove any issue in the case, and not purporting to be a paper of which the plaintiff had any knowledge, or a paper that at the time the plaintiff entered was called to his attention of which he had notice, and because it cannot affect any act of the plaintiff, who entered by virtue of a deed from the original scripee in this case; and upon

the further ground that the commissioner of the land office certifies that it was filed in that office by this man Wells and is for Sioux scrip 430 E for 160 acres, and not for 80 acres, the tract in controversy here.

84 Objection overruled and paper read in evidence to the jury; to which ruling counsel for the plaintiff duly exp*e*cted.

Paper marked "Defendants' Exhibit No. 4."

Exhibit 4 is as follows, to wit:

DEFENDANTS' "EXHIBIT NO. 4" IN CAUSE NO. 20.

(4–207.)

DEPARTMENT OF THE INTERIOR, E. I. G.
GENERAL LAND OFFICE, J. A. D.
WASHINGTON, D. C., *July* —, 1889.

I, W. M. Stone, acting Commissioner of the General Land Office, do hereby certify that the annexed copy of power of attorney from Walter Bourke to Henry T. Wells, filed in this office with Sioux half-breed scrip No. 430 C for 160 acres, R. & R. 28 located at Fargo, Dakota Territory, is a true and literal exemplification of the original paper.

[SEAL.] In testimony whereof I have hereunto subscribed my name, and caused the seal of this office to be affixed at the city of Washington on the day and year above written.

W. M. STONE,
Acting Commissioner of General Land Office.

Know all men by these presents that I, Walter Bourke of Red River Settlement, Rupert's Land, British North America, have made, constituted and appointed, and by these presents do make, constitute and appoint H. T. Wells of Hennepin county, Min., a true and lawful attorney for me and in my name, place and stead, to select and locate, at any land office in the United States, the lands to which I may be entitled *to* by reason of my "Sioux half-breed Lake Pepin reserve scrip," to wit: Number 430 letter C for 80 acres. Number 430 letter B for 40 acres. Number 430 letter E for 160 acres. Said script being granted and issued to Walter Bourke in accordance with the provisions of an act of Congress, approved July 17th, 1854, entitled An act to authorize the President of the United States to cause to be surveyed the tract of land in the Territory of Minnesota, belonging to the half-breeds or mixed bloods of the Dakota or Sioux nation of Indians, and for other purposes; and on such location to ask for and receive the patent therefor; hereby declaring all lawful acts of my said attorney in the premises of the same, valid and binding as if done personally by me.

And I further ordain and declare that he the said Henry T. Wells is hereby irrevocably vested with all such power and authority as I might or could exercise personally if present and acting; hereby ratifying and confirming whatsoever my said attorney may lawfully do in the premises.

In witness whereof, I have hereunto set my hand and seal this seventh day of May, A. D. 1866.

WALTER BOURKE. [L. S.]

85 Signed, sealed, and delivered in presence of—
A. G. B. BANNATYNE.
DANIEL DEVLIN.

STATE OF MINNESOTA, } ss:
County of Pembina, }

On this seventh day of May, A. D. 1886, came before me Walter Bourke, to me personally known to be the person who executed the foregoing power of attorney, and he acknowledged that he executed the same for the use and purposes therein expressed.

On a private examination separate and apart from her said husband acknowledged that she signed the said power of attorney, freely without compulsion from any one.

HUGH S. DONALDSON,
Notary Public.

Endorsed as follows: Defendants' "Exhibit No. 4." Filed Nov. 30, 1891. A. L. Richardson, clerk. Defendants' "Exhibit No. 4" in cause No. 20. Filed Dec. 9th, 1891. A. L. Richardson, clerk.

Counsel for defendants offers in evidence copies of the original and duplicate scrip on file in the land office.

Counsel for plaintiff objects to the offer as incompetent and immaterial. Incompetent for the reason it is not certified by any authority from whom a certificate is authorized by statute. It is not a public document certified by a public officer having custody of it. In this case the original is the only competent evidence of the contents of the original. This purports to be certified by a party who certifies generally that they are copies of all papers on file in his office. Irrelevant and immaterial, and it is not competent to contradict an entry made under the original scrip issued in this case by a duly authorized agent; inasmuch as it purports to be a copy of papers relative to an entry made under a copy of an original paper. We object further particularly to all of this document certified to excepting the first two sheets after the certificate and commencing at the fifth page at the word "duplicate" and endorsed in red ink across the face of it "A true copy of the original which is represented to have been lost and authorized to be issued in the place thereof, see endorsement on back. (Signed) W. R. Clumm, acting Commissioner of Indian Affairs." We object to it further that there is no authority in law to issue a copy or a duplicate of the original scrip, that there was no authority for the location of it, and that the entry made under it would be absolutely void as furnishing any evidence here as to the cancellation of this patent; and as to any issues herein it is incompetent.

Objection overruled and paper read to the jury, to which ruling counsel for the plaintiff duly excepted.

Paper marked Defendants' " Exhibit No. 5."

After the reading to the jury, counsel for plaintiff moves to strike it from the files for the reasons above stated. Motion overruled by the court, to which ruling of the court counsel for plaintiff duly excepted.

86 " Exhibit No. 5 " is as follows, to wit:

DEFENDANTS' " EXHIBIT NO. 5 " IN CAUSE NO. 20.

B. (4–207.) H. K. W.
50611. J. A. D.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *May* 29, 1889.

I, —— ——, Commissioner of the General Land Office, do hereby certify that the annexed copies of all the papers on file in the office with Sioux half-breed scrip No. 430 C. R. & R. No. 15, located at Fargo, Dakota, are true and literal examplifications of the original papers. In testimony whereof I have hereunto subscribed my name, and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

S. M. STOCKSLAGER,
[SEAL.] *Commissioner of General Land Office.*

Sioux half-breed reserve at Lake Pepin.

No. 430 C.

Certificate or scrip. (Not transferable or assignable.)

Acres, 80.

Issued in accordance with the provisions of the act of Congress approved July 17th, 1854, entitled " An act to authorize the President of the United States to cause to be surveyed the tract of land in the Territory of Minnesota belonging to the half-breeds or mixed bloods of the Dacotah or Sioux nation of Indians and for other purposes."

Department of the Interior, Office of Indian Affairs.—Five certificates or pieces of scrip, No. 430 A to 430 E, A and B being each for 40, C for 80, and D and E each for 160 acres, issued in satisfaction of this claim for 480 acres.

Whereas, it has been duly reported to this office by the commissioners appointed by the President to ascertain the number and names of the half-breeds and mixed bloods, entitled to share in the benefits of the grant or reservation above particularly mentioned, that Walter Bourke of about the age of 26 years is one of the said half-breeds or mixed bloods of the said Dacotah or Sioux nation of Indians, specified in the said act of Congress, and as such is entitled to receive a certificate or scrip, *pro rata*, in exchange for his right, title and interest in and to the said reservation of land, lying on the west side of Lake Pepin and the Mississippi river, in the said Terri-

tory of Minnesota, which was set apart for the benefit of said half-breeds and mixed bloods by the 9th article of the treaty of Prairie du Chien, of July 15, 1830.

And whereas the said report of the said commissioners has been approved and confirmed by the President of the United States, and the said Walter Bourke has duly and formally relinquished to the United States all his right, title and interest in and to the said reservation of land, as by his instrument of relinquishment sufficiently appears.

87 Therefore, be it known, that this certificate or scrip issued by authority aforesaid, will entitle the said Walter Bourke to locate at the proper land office, the quantity of eighty acres of land, as a part of his four hundred and eighty acre claim, upon any of the lands within the said reservation that were not occupied on the 17th day of July, 1854, by actual and *bona fide* settlers of the said half-breeds or mixed bloods, or such other persons as had at that date, or prior thereto, gone into said Territory, by authority of law, or upon any other unoccupied lands subject to pre-emption or private sale, or upon any other unsurveyed lands not reserved by Government, upon which they have respectively made improvements.

This certificate or scrip is not by law transferable and any assignment or conveyance of the same is therefore void.

Given under my hand and the seal of the department at Washington, this twenty-fourth day of November, A. D. eighteen hundred and fifty-six.

GEO. W. MANYPENNY,
Commissioner.

Delivered to Henry A. Lambert, attorney, Sept. 26th, 1857. Delivered at this office by William R. Wallace, attorney-in-fact for Walter Bourke, June 5th, 1886.

ROBERT E. McFARLAND.

(Duplicate.)

No. 430 C, certificate or scrip.

Acres, 80. (Duplicate.)

Sioux half-breed reserve at Lake Pepin, not transferable or assignable.

Issued in accordance with the provisions of the act of Congress approved July 17th, 1854, entitled "An act to authorize the President of the United States to cause to be surveyed the tract of land in the Territory of Minnesota belonging to the half-breeds or mixed bloods of the Dacotah or Sioux nation of Indians, and for other purposes."

Department of the Interior, Office of Indian Affairs.—Five certificates or pieces of scrip, No. 430 A to No. 430 E, A and B being each for 40, C for 80, and D and E each for 160 acres, issued in satisfaction of this claim for 480 acres.

Whereas it has been duly reported to this office by the commis-

sioners appointed by the President to ascertain the number and names of the half-breeds and mixed bloods entitled to share in the benefits of the grant or reservation above particularly mentioned, that Walter Bourke of about the age of twenty-six years, is one of the said half-breeds or mixed bloods of the said Dacotah or Sioux nation of Indians, specified in the said act of Congress and as such is entitled to receive a certificate or scrip, *pro rata* in exchange for his right, title and interest in and to the said reservation of land lying on the west side of Lake Pepin and the Mississippi river in the said Territory of Minnesota which was set apart for the benefit of said half-breeds and mixed bloods by the 9th article of the treaty of Prairie du Chien, of July 15th, 1830.

88 And whereas the said report of the said commissioners has been approved and confirmed by the President of the United States, and the said Walter Bourke has duly and formally relinquished to the United States all his right, title and interest in and to the said reservation of land, as by his instrument of relinquishment sufficiently appears.

Therefore be it known, that the certificate or scrip issued by authority aforesaid, will entitle the said Walter Bourke to locate, at the proper land office, the quantity of eighty acres of land, as a part of his four hundred and eighty acres claim upon any of the lands within the said reservation that were not occupied on the 17th of July, 1854, by actual and *bona fide* settlers of the said half-breeds or mixed bloods or such other persons as had at that date, or prior thereto, gone into said Territory by authority of law, or upon any other unoccupied lands subject to pre-emption or private sale, or upon any other unsurveyed lands not reserved by Government, upon which they have respectively made improvements.

This certificate or scrip is not by law transferable, and any assignment or conveyance of the same is therefore void.

Given under my hand and the seal of the department at Washington, on this twenty-fourth day of November, A. D. eighteen hundred and fifty-six.

GEO. W. MANYPENNY,
Commissioner.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS.

I, Henry R. Clum, acting Commissioner of Indian Affairs, do hereby certify that the within is a true copy from the records of this office of the original certificate issued to Walter Bourke and as such the holder thereof is authorized to use it the same as if it were the original, which original it appears from satisfactory evidence furnished this office has been lost.

H. R. CLUM,
Acting Commissioner.

DEPARTMENT OF THE INTERIOR, *July 26th*, 1871.

I, B. R. Cowen, acting Secretary of the Department of the Interior of the United States, do hereby certify that Henry R. Clum,

whose name appears to the foregoing certificate is now and was at the time of signing the same acting Commissioner of Indian Affairs, and that full faith and credit are due to his official acts as such.

In testimony whereof I have hereunto set my hand and affixed the seal of said department.

B. R. COWEN,
Acting Secretary.

Register's and receiver's No., 15; scrip certificate No. 430 C.

Sioux half-breed reserve at Lake Pepin, act July 17th, 1854.

LAND OFFICE, FARGO, D. T., *March* 9, 1880.

We hereby certify, that the attached half-breed scrip No.
89 430, letter C, was on this day received at this office from Walter Bourke, of Manitoba.

THOS. M. PUGH, *Receiver.*
HORACE AUSTIN, *Register.*

I, Walter Bourk, of Manitoba, hereby apply to locate, and do locate, the tract of land designated by the plats of the Government survey, to wit, the S. ½ of the S. W. ¼ of sec. 29, township 125 north, of range 62 west of the 5th P. M. containing eighty (80) acres in the district of lands, subject to sale at the land office at Fargo, Dakota Terr'y, in satisfaction of the attached scrip No. 430, letter "C," issued under the act of July 17th, 1854.

Witness my hand and seal this 9th day of March, A. D. 1880.

WALTER BOURK,
By HENRY. T. WELLES,
His Attorney-in-Fact.

Attest:
HORACE AUSTIN, *Register.*
THOS. M. PUGH, *Receiver.*

LAND OFFICE, FARGO, D. T., *M'ch* 9, 1880.

We hereby certify that the annexed scrip No. 430, letter C, has this day been located on the tract of land as described within, containing eighty acres, agreeably to act of July 17th, 1854, and by the party duly authorized to make such location.

HORACE AUSTIN, *Register.*
THOS. M. PUGH, *Receiver.*

(Endorsed as follows:) S. H. B. scrip. Walter Bourke. 430 C. R. and R. 15. March 9, 1880. Fargo, Dakota. Approved as to location posted Sept. 4, '80. A. G. H. Power with R. and R. 28, app'v'd for patenting May 31, 1881. T. F. S. 1881. 74338. Send patent to J. H. Herron, Washington, D. C. Pat. Dec. 10, 1881. Rec. vol. 5, page 425, 43, 10. Ex.

Please execute and return affidavit to be made by the present owner of the land before a notary public, or clerk of a court.

12—250

STATE OF MINNESOTA, } ss:
County of Hennepin, }

Before me, William Mulliken, a notary public, personally came Martin S. James, who, being duly sworn according to law, deposes and says that he is secretary Richmond Townsite Company of Dakota Territory, and said company is the present *bona fide* owner of the south ½ of southwest ¼ section 29, township 125 north, of range 62 west of 5th P. M. in Brown county, Dakota Territory, entered at land office at Fargo, Dakota Territory, on the 9th day of March, 1880, per scrip No. 430, letter C, R. and R. No. 15; that he has not received the patent for said lands.

MARTIN S. JAMES.

Subscribed and sworn to before me this 28th day of October, 1881.

WM. MULLIKEN,
[L. S.] *Notary Public, Minnesota.*

90 (Endorsed as follows:) Defendants' "Exhibit No. 5." Filed Nov. 30th, 1891. A. L. Richardson, clerk. Defendants' "Exhibit No. 5" in cause No. 20. Filed Dec. 9th, 1891. A. L. Richardson, clerk.

Counsel for defendants offers in evidence patent in favor of Walter Bourke, marked "Exhibit 6." Counsel for plaintiff objects to the offer as incompetent, irrelevant and immaterial, in that it professes to be a patent issued upon the duplicate or copy of the original scrip; and immaterial because it cannot affect the rights of Mr. Carter, who entered without notice of it; and further, the patent was issued without authority of law.

The objection was overruled by the court, to which ruling the plaintiff duly excepted.

Paper marked "Exhibit 6" read to the jury in evidence, and is as follows:

DEFENDANTS' "EXHIBIT NO. 6" IN CAUSE NO. 20.

B. H. K. W.
50611 (4–205.) J. A. D.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *May* 29, 1889.

I, S. M. Stockslager, Commissioner of the General Land Office, do hereby certify that the annexed copy of patent in favor of Walter Bourke, founded on location made with Sioux half-breed scrip No. 430 C, at Fargo, Dakota Territory, R. & R. No. 15, is a true and literal exemplification from the record in this office.

In testimony whereof I have hereunto subscribed my name, and

caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

S. M. STOCKSLAGER,
[SEAL.] *Commissioner of General Land Office.*

14828—5m. 6-379.

Certificate 430 C; acres, 80.

The United States of America to all to whom these presents shall come, Greeting:

Whereas, by the act of Congress approved on the 17th day of July, 1854, entitled "An act to authorize the President of the United States to cause to be surveyed the tract of land, in the Territory of Minnesota, belonging to the half-breeds or mixed bloods of the Dacotah or Sioux nation of Indians, and for other purposes," to which Congress passed an amendatory act, approved May 19, 1858, in which said act of 1854 authority is given for the issue and location of Dacotah or Sioux half-breed certificates or scrip; and whereas there has been deposited in the General Land Office of the United States a
91 certificate of the register and receiver of the land office at Fargo, Dakota Territory, No. 15, whereby it appears that Dacotah or Sioux half-breed certificate No. 430 for 80 acres, issued by the Commissioner of Indian Affairs in favor of Walter Bourke has been located and surrendered by the said Walter Bourke in full satisfaction for the south half of the southwest quarter of section twenty-nine, in township one hundred and twenty-five north of range sixty-two west of the fifth principal meridian in Dakota Territory containing eighty acres according to the official plat of the public lands returned to the General Land Office by the surveyor general:

Now know ye, that the United States of America, in consideration of the premises, have given and granted, and by these presents do give and grant unto the said Walter Bourke and to his heirs the said tract above described: to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said Walter Bourke and to his heirs and assigns forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs, laws and decisions of the courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law.

In testimony whereof, I, Chester A. Arthur, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the tenth day

of December in the year of our Lord one thousand eight hundred and eighty-one, and of the Independence of the United States the one hundred and sixth.

By the President: CHESTER A. ARTHUR,
By WM. H. COOK, *Secretary.*

Recorded, vol. 5, page 425.

S. W. CLARK,
Recorder of the General Land Office.

(Indorsed as follows:) Defendants' "Exhibit No. 6," filed Nov. 30th, 1891. A. L. Richardson, clerk. Defendants' "Exhibit No. 6," in cause No. 20, filed Dec. 9th, 1891. A. L. Richardson, clerk.

Counsel for defendants then offered in evidence certified copies of certain papers connected with the issue of a duplicate of Lake Pepin Sioux half-breed scrip No. 430, letter C, for 80 acres.

Objected to by plaintiff's counsel as incompetent, irrelevant and immaterial, as it does not refer or pretend to refer to the title under which plaintiff claims to have entered, and cannot, in any event, affect the validity of plaintiff's entry and case.

The objection was overruled by the court, to which ruling of the court plaintiff by his counsel duly excepted.

Papers marked "Exhibit No. 7" were read to the jury and are as follows:

92 DEFENDANTS' "EXHIBIT NO. 7" IN CAUSE NO. 20.

(1–085*a*) C. A. M.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, D. C., *Sept.* 17, 1889.

I, R. V. Belt, acting Commissioner of Indian Affairs, do hereby certify that the papers hereto attached are true and literal copies of certain papers, in connection with the issue of a duplicate of Lake Pepin Sioux half-breed scrip, number 430, letter "C," for 80 acres, the original of which was issued to Walter Bourke, under the provisions of the act of Congress, approved July 17, 1854, as the same appear on file and of record in this office.

R. V. BELT,
Acting Commissioner.

DEPARTMENT OF THE INTERIOR, J. O. C.
WASHINGTON, D. C., *September* 18, 1889.

I, John W. Noble, Secretary of the Department of the Interior of the United States of America, do hereby certify that R. V. Belt, whose name appears signed to the foregoing certificate, is now, and was at the time of signing the same, acting Commissioner of Indian Affairs, and that full faith and credit are due to his official acts as such.

In testimony whereof I have hereunto set my hand and have caused the seal of said department to be affixed on the day and year above written.

[SEAL.] JOHN W. NOBLE, *Secretary.*

Henry Beard, attorney-at-law and solicitor of claims and land patents (gives special attention to procuring patents for mining claims, and upon all kinds of land entries and locations, and argues contested cases).

Office, No. 515 7th street, P. O. box 745.

WASHINGTON, D. C., *Nov. 7th*, 1870.

Hon. E. S. Parker, Commissioner of Indian Affairs.

SIR: I have the honor to submit herewith, application of Walter Bourke, by Henry T. Welles, his att'y-in-fact, for duplicates of Sioux H. B. scrip—

No. 430 B, for 40 acres.

No. 430 C, for 40 acres, and

No. 430 E, for 160 acres, with proof of publication of notice of application, proof of loss or destruction of the pieces of scrip applied for and certificate of authority of Welles to act in this matter.

Soliciting your early attention in the case, I am, sir,

Very respectfully your obedient servant,

HENRY BEARD,
Att'y & Cl. Agt.

93 *Affidavit of Publication.*

STATE OF MINNESOTA, }
County of Ramsey. }

R. E. Davies, being duly sworn, deposes and says that the annexed printed copy of an advertisement of "to whom it may concern" was cut from the columns of the St. Paul "Pioneer," weekly newspaper printed and published in the city of St. Paul, county of Ramsey and State of Minn., and the seat of government of said State; and that the same was published in said newspaper as an advertisement for three successive weeks at least once in each week, and that the first publication of said advertisement was made on the 30th day of Sept., A. D. 1870, and the last publication was made on the 14th day of October, A. D. 1870, and that during the whole time of said publication he was one of the printers and publishers of said newspaper.

R. E. DAVIES.

Subscribed and sworn to before me this 21st day of Oct., A. D. 1870.

JOHN DONALDSON,
Notary Public, Ramsey County, Minn.

Printers' fees, $375.00.
Paid. P. P. Co.

To whom it may concern:

Public notice is hereby given that an application will be made for duplicate Sioux half-breed scrip of the following described pieces thereof, to wit: No. 430, letter B, No. 430, letter C, and No. 430, letter E, issued to Walter Bourke, under the act of Congress of June 17th, 1854, said pieces of scrip having been lost or destroyed in the city of St. Paul, Ramsey county, State of Minn., on or about the 1st day of Jan., A. D. 1857.

WALTER BOURKE,
By HENRY T. WELLES,
His Att'y-in-fact.

Know all men by these presents that I, Walter Bourke of Red River Settlement, Rupert's Land, British North America, have made constituted and appointed, and by these presents do make, constitute and appoint Henry to Welles, of Hennepin Co., Minn., my true and lawful attorney for me and in my name, place and stead to apply for, receive and receipt for duplicate Sioux half-breed Lake Pepin reserved scrip, and to select and locate at any land office in the United States the lands to which I may be entitled by reason of my said Sioux half-breed Lake Pepin reserved scrip, to wit: No. 430, letter E, for 160 acres; No. 430, letter B, for 40 acres; No. 430, letter C, for 80 acres, said scrip being granted and issued to Walter Bourke in accordance with the provisions of an act of Congress approved July 17th, 1854, entitled "An act to authorize the President of the United States to cause to be surveyed the tract of land, in the Territory of Minnesota, belonging to the half-breed or mixed
94 bloods of the Dakota or Sioux nations of Indians and for other purposes;" and on such location to ask for and receive the patents therefor, hereby declaring all lawful acts of my said attorney in the premises of the same of as valid and binding forces as if done personally by me; and I further ordain and declare that he, the said Henry T. Welles, is hereby irrevocably vested with all such power and authority as I might or could exercise personally if present and acting, hereby ratifying and confirming whatsoever my said attorney may lawfully do in the premises.

In witness whereof I have hereunto set my hand and seal this 7th day of May, A. D. 1866.

WALTER BOURKE. [L. S.]

Signed, sealed and delivered in presence of—

A. G. B. BANNATYNE.
DANIEL DEVLIN.

[U. S. revenue stamp, $1, canceled.]

STATE OF MINNESOTA, } ss:
County of Pembina, }

On this 7th day of May, A. D. 1866, came before me Walter Bourke, to me personally known to be the person who executed the

foregoing power of attorney, and he acknowledged that he executed the same voluntarily for the uses and purposes therein expressed.

HUGH S. DONALDSON,
Notary Public.

[Notarial Seal, Pembina County, Minnesota.]

STATE OF MINNESOTA, } ss:
County of Stearns, }

I, G. S. Mattoon, clerk of the district court in and for the seventh judicial district and county of Stearns aforesaid, do hereby certify that I have carefully compared the foregoing copy of power of attorney, executed by Walter Bourke, with the original this day exhibited to me in the clerk's office, and that the same is a full and correct transcript therefrom.

Witness my hand and the seal of said court at the city of Saint Cloud, in said Stearns county, this 26th of Oct., A. D. 1870.

G. S. MATTOON, *Clerk.*

I hereby apply for the issue to me of duplicate Sioux half-breed scrip No. 430 E, for 160 acres; No. 430 B, for 40 acres, and No. 430 C, for 80 acres, in lieu of the original of the same, which has been lost or destroyed.

WALTER BOURKE,
By HENRY T. WELLS,
His Attorney-in-fact.

Dated Minneapolis, Minn., Oct. 26th, 1870.

In presence of—
L. A. EVANS.
OSCAR TAYLOR.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, *November 12th*, 1870.

SIR: I have the honor to state that an application has been
95 filed in this office by Walter Bourke through his attorney, Henry T. Welles, by Henry Beard, for duplicates of Sioux half-breed scrip numbered as follows, viz:

No. 430 B, for 40 acres,
No. 430 C, for 80 acres, and
No. 430 E, for 160 acres.

Proof of loss or destruction of said scrip having been furnished in due form, I would respectfully inquire if the records of the General Land Office afford any information concerning the scrip claimed to be lost or destroyed.

Very respectfully, your ob't servant,

E. S. PARKER,
Commissioner.

Hon. Joseph S. Wilson, Com'r Gen'l Land Office, present.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS, *November 29th*, 1870.

SIR: Your communication of the 7th inst. inclosing application of Walter Bourke, by Henry T. Welles, his attorney-in-fact, for duplicates of Sioux half-breed scrip, Nos. 430 B, for 40 acres; 430 C, for 80 acres; 430 E, for 160 acres, with proof of publication and affidavit of loss or destruction by said Henry T. Welles, has been received.

In reply I will state that the rule adopted by this office to govern the issuance of duplicate certificates requires that the loss of the originals should be advertised for three consecutive weeks in a newspaper published nearest to the place where the loss is supposed to have occurred, and also to prove the loss by two competent witnesses, whose affidavits must be filed in this office with the evidence of such advertisement. The affidavits of the parties in whose custody the scrip was at the time of its loss must also be presented to this office as a justification for the issuing of a duplicate.

In the event of the death of the party having the custody of the scrip claimed to be lost, as asserted in the present case, a relaxation of so much of the foregoing rule as requires the affidavit of such party will be made, upon the proper evidence being filed in this office that such custodian is deceased.

Very respectfully, your ob't servant,

E. S. PARKER,
Commissioner.

Henry Beard, Esq., P. O. box 745, Washington, D. C.

UNITED STATES LAND OFFICE,
VERMILLION, DAKOTA TERRITORY, *March 9th*, 1871.

Henry Beard, Esq., Washington, D. C.

DEAR SIR: I am in receipt of your letter of the 2nd inst. relative to S. H. B. scrip No. 430 B, for 40 acres, and 430 C, for 80 acres, said to have been located by B. M. Smith at this office. In reply I have the honor to inform you that I have carefully examined the records of this office in regard to the same, and have failed to find
96 any record of the above-mentioned scrip, and I have no knowledge of said scrip ever having been presented at this office.

Very respectfully, your ob't serv't,

B. S. CAMPBELL, *Register.*

P. S.—I am informed that Mr. B. M. Smith resides at Topeka, Kansas.

B. S. C.

(Copy.)

STATE OF MINNESOTA, } ss:
County of Hennepin, }

In the Matter of Loss of S. H. B. Scrip No. 430 "B," "C," and "E" of WALTER BOURKE.

Joseph P. Wilson, being first duly sworn, on his oath says that he knows that Walter Bourke, who makes application, by his attorney-in-fact, Henry T. Welles, to obtain duplicate scrip in lieu of Nos. 430 "B," "C," and "E" issued to him, the said Walter Bourke, under the provisions of the act of Congress of July 17th, 1854; that he, this affiant, knows of his own knowledge that the said described scrip and all thereof was by said Bourke deposited with one Henry A. Lambert, in the city of St. Paul, county of Ramsey, and State of Minnesota, about A. D. 1857; that said Lambert died at said St. Paul on or about the 9th day of Nov., A. D. 1868; that prior to the death of said Lambert he, this affiant, saw said scrip and all thereof in the possession of said Lambert at said city of St. Paul; that he, this affiant, was well acquainted with and personally knew said Lambert for thirteen (13) years last preceding his, the said Lambert's, death.

And affiant further says that at the request of said Walter Bourke and of said Henry T. Welles, the attorney-in-fact of the said Bourke, he, this affiant, has at divers times heretofore made diligent search and inquiries for, of, and concerning said scrip and has been unable to find any thereof or any trace of the same since he, this affiant, saw it as aforesaid in the possession of said Lambert; and affiant says that he verily believes said scrip and each and every thereof was lost or destroyed long before the application of said Walter A. Bourke for duplicates as herein made.

JOSEPH P. WILSON.

Subscribed and sworn to before me this 3rd day of May, A. D. 1871.

[SEAL.] D. W. ALBAUGH,
Clerk of the Fourth Judicial District Court in and for Hennepin County, Minn.

STATE OF MINNESOTA, }
County of Hennepin. }

I, Daniel W. Albaugh, clerk of the district court in and for said county, hereby certified that the above and foregoing named Joseph P. Wilson is personally known to me to be a person of respectability, and that his statements are entitled to credit and belief.

Witness my hand and seal of office this 3rd day of May, 1871.

[SEAL.] D. W. ALBAUGH, *Clerk.*

Henry Beard, attorney-at-law and solicitor of claims and land patents (procures patents for private land claims and upon
97 entry and locations of public lands, attends to adjusting land grants, and argues contested land cases); office, No. 515 7th St., P. O. box 745.

WASHINGTON, D. C., *May 8th*, 1871.

Hon. E. S. Parker, Com. of Indian Affairs.

SIR: Respectfully referring to my letter of the 7th of Nov. last, submitting application of Walter Bourke, by Henry T. Welles, his att'y-in-fact, for duplicates of Sioux H. B. scrip—

No. 430 B, for 40 acres,

No. 430 B, for 80 acres, and

No. 430 B, for 160 acres, with proof, etc. I have the honor to enclose herewith a letter received by me from the register of the U. S. land office at Vermillion, Dakota Ty., in which he states that he has examined the records of his office and has "failed to find any record" of the presentation of the above-mentioned scrip, Nos. 430 B and 430 C. I also inclose an affidavit of Jos. P. Wilson, whose credibility is certified by the clerk of the district court of Hennepin county, Minnesota, in which the affiant sets forth that he knows of his own knowledge that the said described scrip was by said Bourke deposited with one Henry A. Lambert, who deceased on or about the 9th of Nov., 1868, and that he believes that said scrip was lost or destroyed long before the application of said Walter Bourke for duplicates, the said affiant having made diligent search for the same, but failed to find it or any trace thereof.

Renewing the application for duplicates, and referring to the evidence on file of publication of notice,

I am, sir, very respectfully, your ob't ser.,

HENRY BEARD, *Att'y.*

DEPARTMENT OF THE INTERIOR,

C. C. R. OFFICE OF INDIAN AFFAIRS, *May 17th*, 1871.

SIR: I have received your letter of the 8th instant calling the attention of the office *of* your letter of 7th of November last, in which was submitted the application of Walter Bourke, by Henry T. Welles, Esq., claiming to be his attorney-in-fact, for the issuance of duplicates of Sioux half-breed scrip No. 430 "B" 40 acres, No. 430 "C" 80 acres and No. 430 "E" 160 acres.

In reply to your first letter, you were informed on the 29th of November, 1870, among other things that the rule adopted by this office to govern the issuance of duplicate scrip required proof by two competent witnesses of the lost original scrip.

The affidavit of Henry T. Welles, Esq., submitted with your letter of November 7th, 1870, sets forth that the scrip issued to Walter Bourke was by the said Bourke deposited with one Lambert, at St. Paul, Minnesota, for safe keeping on or about the first of January, 1857, and that soon thereafter, in May, 1857, said Lambert
98 died, and that said scrip was lost or destroyed while in his possession.

The affidavit of Joseph P. Wilson, Esq., submitted with your letter of the 8th instant, sets forth that said scrip was by said Bourke deposited with Henry A. Lambert in the city of St. Paul, Minnesota, in 1857, and that said Lambert died in November, 1858, previous to which time said scrip was in his possession.

This office was officially informed by the Commissioner of the General Land Office, on the 23rd of November, 1870, that one Mr. B. M. Smith under date of December 7, 1860, filed in that office a list of scrip including 430 "B" and 430 "C" alleged to have been located by him as attorney on lands in Dakota Territory; that said locations were never perfected, and that said scrip was subsequently returned to Mr. Smith.

On the 7th of October, 1870, a protest was filed in this office by William Bourke through George L. Otes, Esq., claiming to be his attorney, against the issuing of the duplicates as applied for by said Henry T. Welles for the scrip claimed to have been lost, stating that said Welles had no authority to act for said Bourke in any matter whatever.

From the foregoing it appears that the affidavits of Messrs. Henry T. Welles and Joseph P. Wilson conflict with each other in some material points, and that a portion of the scrip at least was in existence after it is claimed to have been lost or destroyed, and that under such circumstances this office must decline to issue duplicates for said scrip, in compliance with the request contained in your letter of the 8th instant.

Very respectfully, your obedient servant,

H. R. CLUM,
Acting Commissioner.

Henry Beard, Esq., 515 7th St., Washington, D. C.

Henry Beard, attorney-at-law and solicitor of claims and land patents (procures patents for private land claims and upon entries and locations of public land, attends to adjusting land grants, and argues contested land cases); office, No. 515 7th St., P. O. box 745.

WASHINGTON, D. C., *May 8th*, 1871.

Hon. E. S. Parker, Commissioner of Indian Affairs.

SIR: I have the honor to enclose herewith for your examination and consideration in connection with the application of Walter Bourke, for duplicate Sioux H. B. scrip No. 430 "B" & No. 430 "C" a communication received by me from the Commissioner of the General Land Office dated the 29th ultimo, in which he states that said scrip "has not been returned to this office nor is there any evidence that the same was ever presented to or filed in this (that) office, &c., or in any U. S. district land office."

According to the recollection of other witnesses a different date than that fixed in the affidavit of Messrs. Welles & Wilson,
99 heretofore filed in your office, is assigned for the death of Henry A. Lambert in whose possession this scrip seems to have been when last identified, about the year 1857.

Therefore with a view of obtaining more particular statements from them, I have the honor to request to withdraw those affidavits from the files of your office.

Very respectfully, your ob't serv't,

HENRY BEARD, *Att'y.*

All official letters must be addressed to the "Commissioner of the General Land Office," and in replying to letters from the office the initial letter on the left-hand corner should be referred to.

W. R. M.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *May* 29, 1871.

Henry Beard, Esq., Washington, D. C.

SIR: In reply to your letter of 20th inst. I state that Sioux H. B. scrip 430 B & C, Walter Bourke, has not been returned to this office located, nor is there any evidence that the same was ever presented to or filed in this office, nor do any of the returns from the Vermillion land office indicate that this scrip was filed there.

The only knowledge this office has of said scrip is in a letter from Byron M. Smith, Yankton, Dacotah Territory, dated in December, 1860, in which he asserts that he filed the scrip for lands in town. 101, R. 49 W. Since, however, this township has been some time surveyed and the above scrip has not been reported as located on any lands therein, it is presumed that if Mr. Smith did file it he subsequently withdrew or lost the papers.

Very respectfully,

WILLIS DRUMMOND,
Commissioner.

C. C. R.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS, *June 10th*, 1871.

SIR: I have received your letter of the 1st instant, enclosing a letter addressed to you by the Commissioner of the General Land Office on the 29th ultimo, and requesting the return of certain affidavits filed in this office in reference to the loss of Sioux half-breed scrip issued to Walter Bourke.

In reply, you will find herewith enclosed the affidavits of Joseph P. Wilson and Henry T. Welles, as requested.

Very respectfully, your ob't servant,

H. R. CLUM,
Acting Commissioner.

Henry Beard, Esq., Washington, D. C.

100 STATE OF MINNESOTA, }
Stearns County. }

Henry T. Welles, being first duly sworn, upon oath says: I am the Henry T. Welles mentioned in the attached power of attorney; I reside in the city of Minneapolis, Hennepin county, State of Min-

nesota; I know the Walter Bourke who executed said power of attorney; I know that he is the same person who was entitled to & to whom was issued Sioux half-breed scrip No. 430, letters E, B, and C, mentioned in said power of attorney; and I further say that said scrip was deposited with one A. H. Lambert for safe keeping on or about January 1st, A. D. 1857, in the city of St. Paul, Ramsey county, Minnesota; that soon thereafter & to wit, on or about the 9th November, 1863, said Lambert died; that since the decease of said Lambert, as aforesaid, the said scrip or any thereof has not been found, nor known to be in existence; that I verily believe said scrip and all thereof was lost or destroyed while in the possession and custody of said Lambert or subsequently; that as the attorney-in-fact of the said Walter Bourke I have during the last four years made diligent search and inquiry for said scrip and have been unable to discover the same or any part thereof; and I further say that this affidavit is made for the sole purpose of procuring the issue to the said Walter Bourke of duplicate scrip in lieu of that lost or destroyed as aforesaid.

HENRY T. WELLES.

Subscribed and sworn to before me this 26th day of October, A. D. 1870.

And I certify that the said Henry T. Welles, affiant, is personally known to me to be a man of respectability and of truth & veracity, & that his statements are entitled to full faith and credit.

L. E. EVANS,
Judge of Probate, Stearns Co., Minn.

STATE OF MINNESOTA, }
County of Hennepin, } *ss:*

In the Matter of the Loss of S. H. R. Scrip No. 430 "B," "C," & "E" of Walter Bourke.

Joseph S. Wilson, being first duly sworn, on his oath says that he knows the Walter Bourke who makes application, by his attorney-in-fact, Henry T. Welles, to obtain duplicate scrip in lieu of Nos. 430 "B," "C," & "E" issued to him, the said Walter Bourke, under the provisions of the act of Congress of July 17th, 1854; that he, this affiant, knows of his own knowledge that the said described scrip and all thereof was by said Bourke deposited with one Henry A. Lambert, in the city of St. Paul, county of Ramsey, and State of Minnesota, about A. D. 1857; that said Lambert died at said St. Paul on or about the ninth day of November, A. D. 1868; that prior to the death of said Lambart he, this affiant, saw said scrip and all thereof in the possession of said Lambert at said city of St. Paul; that he, this affiant, was well acquainted with and personally
101 knew said Lambert for thirteen (13) years last preceding his, the said Lambert's, death; and affiant further says that at the request of said Walter Bourke and of said Henry T. Welles, the attorney-in-fact of said Bourke, he and this affiant has at divers times heretofore made diligent search and inquiries for, of, and

concerning said scrip, and has been unable to find any thereof or any trace of the same since he, this affiant, saw it, as aforesaid, in the possession of said Lambert; and affiant says that he verily believes said scrip and each and every — thereof was lost or destroyed long before the application of said Walter Bourke for duplicates as herein made.

JOSEPH P. WILSON.

Subscribed and sworn to before me this 3d day of May, A. D. 1871.

D. W. ALBAUGH,
Clerk of the 4th Judicial District Court in and for Hennepin Co., Minn.

STATE OF MINNESOTA, }
County of Hennepin. }

I, Daniel W. Albaugh, clerk of the district court in and for said county, hereby certify that the above and foregoing named Joseph P. Wilson is personally known to me to be a person of respectability and that his statements are entitled to credit and belief.

Witness my hand and seal of office this third day of May, 1871.

D. W. ALBAUGH, *Clerk.*

I hereby certify that the date of "the ninth day of November, A. D. 1868," mentioned in the foregoing affidavit as the date of the decease of Henry A. Lambert, is a clerical error and incorrect and that I intended to say and do now state that said Lambert died on the ninth day of November, A. D. 1863.

JOSEPH P. WILSON.

St. Cloud, Minnesota, June 17th, 1871.

STATE OF MINNESOTA, }
County of Ramsey, } *ss:*

In the Matter — the Death of HENRY A. LAMBERT, Esq., of Saint Paul, Ramsey County, Minnesota.

Henry F. Masterson and Orlando Simons, being duly sworn, do each on his oath say, that he knew and was acquainted with the late Henry A. Lambert, of the city of St. Paul, in Ramsey county, Minnesota, for the space of thirteen years prior to November, A. D. 1863, that the said Lambert resided during said period in the said city of St. Paul, that the said Lambert died in the said city on or about the 9th day of November, A. D. 1863.

ORLANDO SIMONS.
HENRY F. MASTERSON.

Sworn and subscribed before me this 9th day of May, A. D. 1871.

P. HEFFERMAM,
Notary Public, Ramsey County, Minnesota.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

I, Albert Armstrong, clerk of the district court, Ramsey
102 county, hereby certify that the above-named Orlando Simons and Henry F. Masterson are personally known to me to be persons of respectability and that their statements are entitled to credit and belief.

Witness my hand and seal of office this 9th day of May, A. D. 1871.

ALBERT ARMSTRONG, *Clerk.*

Henry Beard, attorney-at-law and solicitor of claims and land patents (procures patents for private land claims and upon entries and locations of public lands, attends to adjusting land grants, and argues contested land cases); office, No. 515 7th street, P. O. box 745.

WASHINGTON, D. C., *June 27th*, 1871.

Hon. E. S. Parker, Commissioner of Indian Affairs.

SIR: Having transmitted the affidavits of Joseph P. Wilson and Henry T. Welles to them, they have returned the same to me corrected, and they are now submitted herewith, in the matter of the pending application for duplicate Sioux half-breed scrip of Walter Bourke. I have the honor also to submit the affidavit of Orlando Simons and Henry F. Masterson in the same case.

With great respect, your obed't servant,

HENRY BEARD, *Att'y, etc.*

DEPARTMENT OF THE INTERIOR,
C. C. R. OFFICE OF INDIAN AFFAIRS, *July 26th*, 1871.

SIR: Satisfactory evidence having been filed in this office with your letter of the 27th ultimo, as to the loss of the original Sioux half-breed scrip 430 B, 40 acres, 430 C, 80 acres and 430 E, 160 acres, issued to Walter Bourke, November 24th, 1856, and duplicates of said scrip having been applied for in proper form you will find the same herewith enclosed bearing date of this letter, the receipt of which you will please acknowledge.

Very respectfully, your ob't servant,

H. R. CLUM,
Acting Commissioner.

Henry Beard, Esq., Washington, D. C., P. O. box 745.

15.

DEPARTMENT OF THE INTERIOR,
C. C. R. OFFICE OF INDIAN AFFAIRS, *July 26th*, 1871.

SIR: Satisfactory evidence having been filed in this office as to the loss of the original Sioux half-breed scrip 430 B 40 acres, 430 C 80 acres, and 430 E, 160 acres, issued to Walter Bourke, November

24th, 1856, the application having been made in proper form
103 for the same, I have the honor to inform you that duplicates for the above scrip have this day been issued.

Very respectfully, your ob't servant,

H. R. CLUM,
Acting Commissioner.

Hon. William Drummond, Com. Gen'l Land Office.

(Endorsed as follows:) Defendants' "Exhibit No. 9." Filed Nov. 30th, 1891. A. L. Richardson, clerk. Defendants' "Exhibit No. 7" in cause No. 20. Filed Dec. 9, 1891. A. L. Richardson, clerk.

Counsel for defendants offers in evidence the maps showing the line of railroad.

Counsel for plaintiff objects to the offer as immaterial, irrelevant, and incompetent. It does not appear from the maps themselves that this land was located on a railroad section and no reservation against the Sioux scrip.

The objection was overruled by the court, to which ruling of the court counsel for plaintiff then and there excepted.

Maps marked "Exhibits 8 and 9."

Counsel for defendants then offered in evidence the articles of incorporation of the town of Wallace. Counsel for plaintiff objects to the offer as incompetent, irrelevant, and immaterial. It cannot affect the rights of plaintiff. It was long after his entry in this case.

Objection overruled by the court, to which ruling of the court counsel for plaintiff duly excepted. Paper marked "Exhibit No. 10" and read in evidence to the jury as follows:

DEFENDANTS' "EXHIBIT NO. 10" IN CAUSE NO. 20.

Proceedings County Commissioners, Shoshone County, Territory of Idaho, April Term, 1888, Fifth Day.

MURRAY, IDAHO, *May 2nd*, 1888.

Board met pursuant to adjournment at 10 a. m.

Present: Commissioners J. T. Argyle and W. C. Human, Deputy Clerk M. J. Sweeny.

In answer to petition of the citizens of the town of Wallace, presented by J. C. Harkness, praying for the incorporation of said town, and describing the boundaries thereof, the following order was made, to wit: On this 2d day of May, A. D. 1888, we, the board of county commissioners of Shoshone county, Idaho Territory, in regular session, declare, and it is hereby ordered that the petition filed this day, of the citizens of the town of Wallace, praying for the incorporation of said town, and the appointment of W. R. Wallace, D. C. McKissick, Horace King, C. M. Hall, and C. W. Vedder, as the first board of trustees, be granted. And it is hereby ordered that the following-described property and territory be embraced in the corporation, to wit: Beginning at a post 6 inches square, 7 feet

long, set 3 ft. deep, marked cor. No. 1, W. R. Wallace, U. S. Lot with mound of earth and rocks 2½ ft. high about the same, this cor. No. 1 being situate on a steep hillside facing north, about 150 ft. nearly due south from the junction of Placer creek with the South fork of the Cœur d'Alene river, and about 1,500 feet nearly due west from the confluence of Nine Mile creek with said South fork of
the Cœur d'Alene river and about 250 feet south of the
104 improved graded portion of the old Mullan wagon road; thence run true courses as follows, to wit: East, var. 21° 35′ E. 110 feet to Placer creek, 20 ft. wide flows N. W. 1.430 ft. to old Mullan wagon road, N. W. and S. E. 1,560 to left bank of the South fork of the Cœur d'Alene river 30 ft. wide flows N. W. 1,590 foot of hill, ascend 1,640 ft. set a post 6 in. square, 7 feet long, 3 feet deep, with mound of rocks and earth about the same, post marked cor. No. 2, W. R. Wallace, U. S. Lot from which a black pine 6 in. in diameter bears N. 10° 30′ W. 17 ft., marked cor. No. 2, U. S. Lot Wallace B. T. black pine 6 in. in dia. bears N. 86° 35′ E. 31 ft. marked cor. No. 2, U. S. Lot Wallace B. T. tamarack 8 in. in dia. bears south 47 W. 72 marked cor. No. 2, U. S. Lot Wallace B. T. thence run on east end line south var. 21° 35′, descend 930 ft. of hill to right bank of South fork of Cœur d'Alene river 30 ft. wide flows N. W. 1,030 ft. to right bank of branch of said South fork 25 ft. wide, flows N. W. 1,280 ft. to graded portion of old Mullan wagon road E. & W. 1,320 ft. set a post 6 in. square, 7 ft. long, 3 ft. in ground, with mound of earth and rocks about the same, post marked cor. No. 3, W. R. Wallace, U. S. lot, from which a tamarack tree 16 in. in dia. bears N. 71° west 53 ft. marked cor. No. 3, Wallace U. S. lot B. T. No other witness tree within limits; thence run on south side line west var. 21° 35′ E. 2,640 ft. set a post 6 in. square, 7 ft. long, 3 ft. in ground, with mound of earth and rocks 2½ ft. high about the same, marked cor. No. 4, W. R. Wallace, U. S. lot, from which a cedar tree 12 in. in dia. bears south 87 west 46 ft., marked cor. No. 4, Wallace, U. S. Lot B. T., a balsam tree 12 in. in dia. bears N. 10° E. 73 ft. marked cor. No. 4 Wallace U. S. Lot Wallace house bears N. 42° 28′ east about 1,030 ft.; thence along west end line of claim 400 feet to right bank of Placer creek, north var. 21° 35′ east, creek 20 ft. wide, flows N. E. 440 ft. leave creek and ascend steep hillside 1,150 ft. top of hill and descend 1,320 ft. to cor. No. 1, the place of beginning, and containing an area of eighty (80) acres, situated in N. lat. 47° 28′ and longitude about 116° W. in Placer Centre mining district, Shoshone county, Idaho Territory, on the old Mullan wagon road, on the South fork of the Cœur d'Alene river, at the confluence of Placer creek and Nine Mile creek with said South fork of the Cœur d'Alene river, and about 27 miles up the river from the old Cœur d'Alene mission.

And it is hereby further ordered that henceforth the inhabitants within the above metes and bounds are hereby declared a body corporate and politic, by the name and style of, "The Inhabitants of the Town of Wallace." And that by that name they and their successors shall be known in law, have perpetual succession, unless such corporation be dissolved, sue and be sued, implead and be im-

pleaded, defend and be defended, in all actions, pleas, and matters whatsoever; may grant, purchase, hold and receive property, real or personal, and may lease, sell and dispose of the same for the benefit of the town, and may have a common seal and break and alter the same at pleasure.

It is hereby ordered that the first board of trustees shall
105 consist of W. R. Wallace, D. C. McKissick, Horace King, C. M. Hall, and C. W. Veddar, and shall hold their office until their successors are elected.

J. T. ARGYLE, *Chairman.*

Clerk ——.

STATE OF IDAHO, }
County of Shoshone. }

I, Frank Tibbals, clerk of the board of county commissioners of said county, do hereby certify that the foregoing is a true and correct copy of an order made by the board of county commissioners of said county as the same appears of record in Book "C" of Commissioners' Proceedings on page 235 thereof, at my office and in my custody. In witness whereof I hereunto set my hand and affix the seal of said commissioners, on this 17th day of December, A. D 1890.

[SEAL.] FRANK TIBBALS,
Clerk Board County Commissioners.

Endorsed as follows: Defendants' "Exhibit No. 12." Filed Nov. 30th, 1891. A. L. Richardson, clerk. Defendants' "Exhibit No. 10" in cause No. 20. Filed Dec. 9th, 1891. A. L. Richardson, clerk.

The testimony of GEORGE R. TRASK, taken on a former case between the same parties, was by stipulation read in evidence to the jury, and is as follows:

I am a civil and mining engineer and United States deputy mineral surveyor; have been deputy mineral surveyor six or seven years. I am acquainted with the property in controversy; I surveyed it in 1886. (Plaintiff's "Exhibit A" shown witness.) I made that survey; Col. Wallace employed me to make it, claiming that he was going to locate Sioux scrip upon the 80 acres. That survey is correct, according to my field-notes; I handed it over to Col. Wallace after I had written them out. Don't remember of hearing the word Bourke used. Wallace simply told me he was going to locate Sioux scrip upon it. He did not tell me where he got the scrip. I understood that I was making the survey for Mr. Wallace. I never heard a word about Walter Bourke. I marked the corners of this tract 1, 2, 3, 4 W. R. Wallace, U. S. lot, that is the way I marked them. This was in May 30th and 31st, 1886. He afterwards or at the same time made a contract with me to survey the tract into lots and blocks, and make a map of it, and I did so, about the 1st or 2nd of June, 1886. I surveyed most of it into lots and blocks and made a map of it. Surveyed block 22, the size of the lots were 100 feet

deep and 25 feet wide. Wallace gave me the names I should put on the map for the streets; I gave the map to Col. Wallace. I have since made a map, as I surveyed it, according to my notes. (Map shown witness.) That is the map; that map is correct with the exception of Lockey street, that is marked "Lackey street."

Map is here offered in evidence by defendants, and marked Defendants' "Exhibit 13."

106 Objected to by the plaintiff as incompetent and immaterial; on the ground that the testimony does not show that there had been any map filed in accordance with any law in regard to maps of towns, nothing to show the streets were dedicated, and nothing to show the map was filed as required by law. The court overruled the objection and submitted the map, with a view of showing that the ground in controversy has been cut into lots and blocks, and that it has been recognized as the town-site map as surveyed; to which ruling the plaintiff excepted.

I saw the map which I gave to Col. Wallace in June, 1886, once or twice afterwards, in his office in Wallace. I think that map there, "Exhibit 13" has been generally recognized as the map of the town of Wallace, in reference to the dealings and sales made under it. I have heard it referred to several times in transactions. (Witness points out block 22.) That block was surveyed upon the ground by me at the time I made the original map for Col. Wallace; the lots were marked. The lots are 100 feet deep by 25 feet wide, and the alley 25 feet wide; the alley was marked by me in my survey. At the time I made this survey, as I remember, there was a great deal of timber standing; and a good deal of down timbers; I know there was on almost all of the tract. Don't remember whether any timber had been cut off.

Cross-examination by Mr. ALLEN:

The heaviest part of the timber on the tract was near block 22. Right in by block 22, as my recollection is, there was a swamp, and more trees standing than down; it was heavy timber; I have been over the Cœur d'Alene in a great many different places; I have seen places more heavily timbered, but not many. It was certainly a very heavily timbered tract; it was almost inaccessible to get into this tract at that time. I did not mark all of the blocks off into lots on the ground. I marked the corners of the blocks, planted a stake at the corner of each. I marked the four corners of block 22, put small stakes on the north and south sides of the block to mark where the lots would be; did not mark the lots on the interior of the block along the alley. I put a stake at the southeast corner of lot 24, northeast corner of lot 23, northwest corner of lot 1, and southeast corner of lot 2, of that block; that was all the stakes I put on that block. The outside boundaries of this block were pretty well marked; and the inside corners of the lots were not marked along the back part of the lots; I never marked them any further. The lot stakes were about an inch square, and a foot long; some-

times they were about three feet long, if it was swampy or in a wet place. I think I had gum boots on at the time. I made the most of the map, "Exhibit 13," four or five days ago. It is not a tracing from the map I gave Col. Wallace in 1886; I made it from my field-notes.

T. A. DOWD, being called and sworn as a witness on behalf of the defendants, testified as follows:

I reside at Wallace; have lived there regularly about a year. First became acquainted with the town of Wallace in the spring of 1884; went there with Wallace, and located a town site. I remained there in 1884 until some time in September, the same fall. We made some improvements on the ground and built some cabins; staked out 160 acres of ground. Next returned in the spring of 1885 and stayed there, I think, until the last of July. I don't think I was there in 1886; I was there in 1887. I never saw any improvements on block 22. Col. Wallace and I cut some timber off of block 22 and whipsawed it into lumber; some timber had been cut before. We built five cabins in 1884 and 1885, and cut most of the timber and shakes off of this land. When I was there in 1887 I should judge a good portion of the timber was cut off. Mr. Carter had a saw-mill there. I cannot state where he obtained his timber for the saw-mill. I know there was timber off of the town site and went to the mill. The railroad reached the town of Wallace in 1887, in the fall or winter.

107

P. J. HOLLAHAN, being called, sworn and examined as a witness on behalf of the defendants, testified as follows:

I am acquainted with the town of Wallace, and with the extent of the town-site limits. I first became acquainted with that ground in 1885. I have lived there about six years. I went there first in May, 1885, and became an inhabitant of the town. I lived on what is now the street in front of lots 19 and 21. I lived in what is now Cedar street, and about 125 feet from what is now block 22. I bought that ground from Col. Wallace, lying west of the northwest corner of block 22. In 1885 block 22 had considerable timber on it, the southern and eastern portion of the block. Mr. Wallace and myself cut down considerable timber; not very much was cut before June, 1886. Mr. Wallace had some cut and we cut a few logs there. I was there when Trask made his survey. Mr. Hawes for Mr. Carter brought a saw-mill in the fall of 1886. I know that timber was cut off of this block 22 for the saw-mill, and it was cut by some wood-choppers—Mr. Gifford, Mr. Bernier, Mr. Holt, and a couple of other fellows. I don't remember their names. I don't know whether the timber was sold by them to Carter or not, of my own knowledge. This was in August or September, 1886. To the best of my recollection all the lumber was cut off of the block in 1886. It was mostly cedar trees, averaging all the way from 18 inches to four or five feet in diameter at the butt end. It was hauled to the mill. The tops were left upon the ground; the stumps were all the way from 18 inches to five or six feet in height. None of the stumps

were ever cleared off by Mr. Carter in 1886 or 1887, or prior to February, 1889. I saw the block continuously almost every day from 1885 to February, 1889. My place of business is 75 feet from that block, the width of the street. During that time I never saw any logs rolled up upon that block and piled into log heaps and burned up by anybody. I think if any had been I would have known it. On the 19th of February, 1889, there was several snags on the block all the way from 12 to 30 feet in height. The down timber was very thick indeed. You could walk almost from one
108 end to the other on down timber. The Carter house was south of block 22, two streets and a half a block away. The railroad came into Wallace late in the fall of 1887. The stopping place of the railroad was five or six hundred feet north of block 22 and going to the northwest corner of block 22 from the railroad you would have to cross the Cœur d'Alene river. The sidewalk on the west side of block 22 was erected after the railroad came in; it ran down to the southwest corner and across Bank street around to Hawes & Kings' store on Hotel street, thence across to the Carter house. I was in Wallace on the 19th of February, 1889; there were some stumps on lots 2 and 4 in this block at that time, and I think a few logs; not near as many as on the rest of it. There was no enclosure around those two lots nor any building on either of them. I was on these lots on the 19th of February, 1889, when Mr. Ruddy took possession of these lots. They had a fire there, and I presumed there was five or six people there at the time. I saw Murray there; he did not have a gun in his hands. I know Mr. Ruddy located these lots on that day, lots 2 and 4. Mr. Ruddy fenced these two lots three or four days after the 19th of February. Lots 6 and 8 were vacant and unoccupied on the 19th of February. There was a few stubs, I think, and several stumps. He put up a notice on the ground, and fenced it afterwards in four or five days. There was a terrific fire went over block 22 in the summer of 1886, just before Mr. Carter came in with the mill, and it burned out several trees, and burned everything in its way almost. The fire started near the northwest corner of block 22, and went south and burned all the leaves off the green trees and burned down several trees. There has been several fires on there since. I know where the Heller house is situated, on the south side of Bank street. It faces north towards block 22, nearly opposite the middle of the block. The ordinary way of approaching the Heller house in 1885, 1887, 1888 and 1889 up to February, was coming from the northwest corner through block 22, diagonally across the block. I know the hotel kept by Mr. Arment, up nearly the opposite side of the northwest corner of block 22. I know of Mr. Arment building a sidewalk from the corner of Cedar street running north to the depot; I think he built it some time in 1888. The Arment sidewalk was built before Mr. Carter's sidewalk on Sixth street. When the lots were located and fenced on February 19th, they ceased to travel diagonally across the block through this trail. There was a whole lot of timber in this alley on block 22, on the 19th of February, 1889; the whole was covered with down timber and stumps. I am

acquainted with the value of town lots in Wallace during the month of April, 1889. I should think lots 2, 4, 6, 8, 10, 14, 16, 18, 22 and 24 in that block would be worth about $1,400 or $1,500 on the 12th of April, 1889, all together. Lots 2 and 4 would be worth about $600; 6 and 8 $200; 10 and 14 $75 to $100 apiece; 18, 22, and 24 would not exceed in value $75 apiece.

Cross-examination by Mr. HEYBURN:

The sidewalk from Arment's corner to the depot, built just after the railroad came there, was simply plank laid lengthwise;
109 some places probably but one plank laid in the mud, and no stringers. There was very little brush on these lots on the 19th of February, 1889; there were some big logs or stumps that had been blown out of the street. I think that these lots were not cleared up, in the sense I would call a lot cleared for the ordinary purposes of building. I don't think I said there were any trees on lots 6 and 8; there were several stumps and several stubs; I should think there were logs enough to make 10 or 15 cords of wood; quite a few tree tops. I know there was timber at the northeast corner and tree tops.

J. M. HARRIS, being called and sworn as a witness for and on behalf of the defendants, testified as follows:

I reside at Wallace and have so resided since March, 1887; I am acquainted with the premises in controversy; have known them since March, 1887. I am a dealer in real estate in Wallace, have been so dealing about three years, and was acquainted with the value of real estate in the month of April, 1889. The premises in controversy were not worth over $1,000, at that time. Lots 2 and 4 were worth $500, the balance of the lots fronting on Cedar street in that block had no real value at that time; the street was not opened and no way to get to them; the street was full of down timber and marshy places in it. I sold the lots to Cap. Human, of which he testified, for $300, to be paid for when the title was settled; they are today worth $4,000. I first saw the lots in controversy in 1887. When I saw them most of the large timber suitable for saw-logs had been cut off. Along in the summer of 1887 there was some dead trees cut off, for the purpose of supplying the mill with firewood; I was working at the mill at the time myself; it was Mr. Carter's mill. In 1887 and 1888 my business was such that I would cross the block, perhaps, 20 times a day. During that time there was no logs piled up and burned, that I saw. A great many of the tree tops were cut up into wood by people living in adjoining property. I was in Wallace the 19th of February, 1889; at that time the large trees had been cut down, and perhaps there were a few small ones standing—one or two that I know of. There were on that block perhaps 20 or 25 snags, where the fire had gone through and burned the trees down. It was full of stumps; most of the lots were full of burned logs, and particularly on lots 22 and 24, in the northeast corner; it was a marsh. None of the lots in controversy had been

enclosed; there was no buildings on them; Cedar street had not been opened any further east than Sixth street and was impassable in front of the lots in controversy. The alley to the south of the lots in controversy was full of stumps and burned logs; don't know that there was any trees standing in it. I know a trail that crossed from the northwest corner of block 22 through to the Heller house, diagonally across the block. The trail was traveled up to about the 20th of February, 1889, when the lots were fenced after relocating the lots. The sidewalk on the block was constructed just about the time the railroad got in in 1887; it commenced at the north-
110 west corner of block 22, and extended up Sixth street across Bank street, round half of block 21, to the Carter house. I don't know who had the sidewalk built. I think the purpose of the building of this sidewalk was to carry the travel from the depot to the Carter house. I am deputy recorder of the town of Wallace. I was upon some of the lots in controversy on the evening of the 19th of February, 1889; saw Hawes there, but not on that side of the block. I saw a fire and a heap of logs there in the northwest corner, and I saw Mr. Ruddy, Murray, and Robbins there; I saw no hostile demonstrations there by any one that evening. Murry had no gun, Everybody, with the exception of five men, perhaps, in the town. were all out that night, those that were of age, children and ladies stayed at home. They were locating lots, I saw about 150 people at that business. On the night of the 19th of February, I saw Mr. Ruddy engaged in putting up a notice; he put his notice first, and commenced building a small house, and put up a fence around the house; it was a four-board fence; boards six inches wide and posts about eight feet apart. I saw Murray put up his location notice and construct a fence of the same kind. I think I saw Murray's notice about the 25th; I think Donnelly's lot was not located until the 23d; I don't think Mr. Stevens commenced fencing his lot but commenced building it the same day. I think Patterson's lot was located some time in March; he fenced it in.

Cross-examination.

Examined by Mr. ALLEN:

I have been engaged in the business of selling real estate for about three years in the town of Wallace. I suppose I sold 150 to 200 lots there before February 19th, 1889. I suppose I have sold 30 or 40 of the relocated lots a week, sometimes. I have sold some of them perhaps ten or 12 times; the most of them were relocated property. The lots I sold Human were some that I relocated on the 19th of February. This jumping commenced about eight or nine o'clock at night, and continued until 11 or 12 o'clock.

CHARLES RUDDY, being duly sworn and examined for the defendants, testified as follows:

I have been around Wallace since 1884, and resided there constantly since 1888; I have prospected near there and made my head-

quarters at Wallace. When I first came there in September, 1884, there were three or four log cabins there, but no one living in them. When I first became acquainted with block 22, in 1884 and 1885, it was not a block; the place was then called Placer Centre. My prospects and mines were situated from a mile to four miles from Wallace in different directions. When I first saw this block, it was heavily timbered with large cedar trees. There was very little timber cut off of it where people had camped. In the summer of 1885, Mr. Wallace had some men whipsawing lumber there; I think they cut about 3,000 feet. It was in the same condition when Mr. Trask made his survey in the spring of 1886, excepting Mr. Hollahan
111 had three or four acres fenced around the northwest corner. The saw-mill came in there in the fall of 1886; I saw Mr. Hawes there with it; it was put up in the southeast of block 22; the mill was supplied with lumber that grew around there all over the town site and the mountain sides and up and down there within a mile and a half of town. The lumber that was growing on block 22, all that was fit to be, was taken to the mill and sawed; some of the balance was taken to the mill for firewood, and boys there in town cut it into firewood and sold it to the people living there in town. The tree tops and buts of logs that were not fit for lumber were left upon the ground. It was what might be called a cedar slashing. I never saw any fires kindled upon that block for the purpose of burning logs before the 19th of February, 1889. I was there one day when they were building sidewalk; it was built for people to walk on going to the Carter house. There was a trail leading from the northwest corner of the block to the Heller house; that trail continued to be traveled until I fenced lots 2 and 4 on the 23d of February, 1889. The sidewalk built in the fall of 1887 was not built until after the railroad got in there. In high water the water ran all over that portion of the town, caused by a big jam in the river above, and I put in a dam and turned part of the water off, when Mr. Harris blew this jam out of the river. On the 19th of February, 1889, lots 2 and 4 had a whole lot of logs on them and some stumps had been taken out where the sidewalk was built and piled up along the west side of the lots; they were old rotten logs that could not be made into wood. I guess there was fifty logs on lots 2 and 4; I partly located these lots on February 19th; posted a notice on that day. (Notice shown witness.) That is a copy I think of the notice I posted.

Notice offered in evidence by defendant; counsel for plaintiff objected to the notice as incompetent and immaterial; objection overruled by the court and notice admitted, as tending to show that defendants entered upon the ground peaceably; to which ruling plaintiff excepted. Paper marked "Exhibit 13" and is as follows:

Notice is hereby given, that I, the undersigned, have this 19th day of February, 1889, located lots 2 and 4, block 22, Shoshone county, Idaho.

C. F. RUDDY, *Locator.*

Attest: M. L. MURRAY.

Witness continues: I fenced the lots with a four-board fence, and posts eight feet apart, on February 23d, and proceeded to build a house upon it, and went to living there. I saw Murray there on the night of February 19th. I know positively that Mr. Murray had no gun around him of any description that evening; saw McKissick, Porter and Hawes there that evening; they came there to locate the lots and had their notice in their hands; I told them I had located ahead of them; they went over and read my notice and went away. All Mr. Murray — that night was to post a notice on lots 6 and 8; I think I am acquainted with the contents of the notice; I think I wrote it. (Paper marked "Exhibit 14" shown witness.) That is a correct copy of the notice.

112 Notice offered and objected to by plaintiff as incompetent for any purpose; objection overruled and plaintiff excepted. Notice is as follows:

EXHIBIT 14.

Notice is hereby given that I, M. L. Murray, have this 19th day of February, 1889, located lots 6 and 8 in block 22, Wallace, Shoshone Co., Idaho.

M. L. MURRAY, *Locator.*

Attest: C. F. RUDDY.

Witness continues: Murray fenced lots 6 and 8 on February, 23d, with the same kind of a fence as I made. I know Mr. Robbins; he put up his notice on lot 10 on the 25th, and proceeded to fence it right off. I know Donnelly fenced lots 14 and 16. I saw Mr. Stevens go on lot 18 and build a house four or five days after the 19th. I know Mr. Petterson. He located and fenced lot 22 a couple of weeks after February 19th. That lot was not cleared at all; there had originally been a great many cedar trees growing there; the sound ones had been cut down and made into lumber; those that are hollow are still standing on the ground. The trunks and tops were still on the ground, and there had never been any fire on them. The ground was quite swampy there; there was no Cedar street there on the north except on paper; it was in a natural state, only what timber had been cut off for the saw-mill; it was impassable for vehicles and it was all swampy down at the end. I am acquainted with the value of property in Wallace on April 12th, 1889. Lots 2 and 4 were worth $700; 6 and 8, $250 apiece; 10 and 24, $50 a lot; don't think 14 and 16, 18 and 22 could be sold for any amount; the total value of all the lots in controversy would not exceed $1,200 at the most. There was three streams coming in from the south, and Mr. Carter got them all; the natural course of one of these streams came right across near 6th street, about 75 feet from block 22; Mr. Wallace took up the water right there and afterwards sold it to Carter; Carter put up a reservoir on the hill and conducted the water over town and sold it to the people. I hired the water put in my building, and paid Mr. Carter for putting it in, and have since paid him $500 a year for that water. The water

was furnished by a company; it was headed the Wallace Water Company. I saw fellows cutting wood on the lots in controversy after February 19th, 1889. I have no idea how much there was; I should judge 50 or 60 cords. On the lots I located, I piled the logs remaining there and burned some of them; some were so large, wet and soggy they would not burn; I hired a team of mules to haul them off. When I started to build I blowed out some stumps and burned others down; it cost me $75.00.

Cross-examination:

From September, 1888, until the 19th of February, 1889, I was there more than once a week, but not every day. I don't
113 think lots 2, 4, 6 and 8 had any tree tops on them on the 19th of February; there were a good many logs upon them, from six inches to three feet in diameter; the logs lay promiscuously all over. There was a good many logs on lots two and four; there were not many on lot 2; there were 12 or 15 great large stumps about 15 feet high on lot 2; there was a slough 15 or 20 feet wide on lots 6 and 8; the sidewalk was built across of loose logs laid down there; the sidewalk was not level; there was a sag across that slough. No timber ever grew in the slough. Murray and I fenced our lots together, 2, 4, 6 and 8. There was all of 50 logs on lots three and four when I entered; the largest were about 2½ feet in diameter; there was one log at least 75 feet long; they ranged from that down to eight or ten feet long; a great many of them were old trees that were blown down; torn up by the roots and the roots decayed; they were rotten and water-soaked; three or four of them had blown up by the roots. I don't remember who cut the 50 or 60 cords of wood; it must have been in the inclosure of Patterson, Stevens and Robbins. There was three or four green trees cut into wood down in that corner of the block.

M. J. DONNELLY, being duly sworn as a witness in behalf of the defendant-, testified as follows:

I am one of the defendants; have been living at Wallace seven or eight months; I was in Wallace on February 19th. At the present time I am engaged in newspaper work. On February —, 1889, I was cutting wood for the Granite Concentrator. In 1888 and 1889 I was in Wallace about twice a week. I know the ground in controversy. On the 19th of February, 1889, the ground was partially covered with loose timber, or timber that had gone to waste over the ground, with logs and dead wood that had gone to waste from the effect of cutting timber off the ground itself. All the stumps on which the timber grew were on the ground; they ranged from 2 to 5 feet high; the snags are some higher. I located lots 14 and 16 February 23d, 1889; they were not inclosed, and had no buildings on them at the time; I posted up my notice and started to fence, and completed the fence before the 1st of March. I cleared off these lots partially myself, and partially through a contract with others. I put between $75 to $100 worth of work on those two lots before

they were ready for building purposes. There was no firewood cut off of my lots for market. The timber on my lots supplied the cook with firewood for three or four months. The fence was four boards high, posts eight feet apart. Mr. Stevens put up his notice the same time I did, and proceeded to build a house without fencing, commenced building the 24th. Patterson didn't take possession until the 25th. He fenced it in with a four-board fence about the first of March; I know Mr. Murray. I was on lots 6 and 8 during the evening of February 19th; met Murray on lots 2 and 4 a couple of times during the evening. I also saw Charles Ruddy and Charles Robbins and a dozen other persons there that I couldn't remember the names of. (Paper shown witness.) This is a true copy of the notice
114 I posted; I made this copy myself from the records kept in the possession of Johnny Harris. The notice I posted has been lost or destroyed; I posted a notice saying, I do hereby claim for building purposes lots 14 and 16, block 22, town of Wallace, as originally surveyed and platted, and signed my name to it and had two witnesses sign it. I was acquainted with the value of lots in the town of Wallace on the 12th of April, 1889; the lots in controversy were worth at that time $1,000 to $1,500 all together.

Cross-examination:

On the 19th of February, 1889, there were no tree tops on lots 2, 4, 6 and 8; there was limbs and brush there. The general appearance of the ground was that it was rubbishy, and contained a number of logs scattered in every direction, and a number of stumps and snags. Lots 14 and 16, and perhaps the corner part of 2 and 4, were the best cleared parts of the tract. My ground lay next to Mr. Stevens, and was the best cleared of the two; he got a little house in between some large stumps; the house was about 14 by 16.

Redirect examination:

The lots were 25 by 100 feet, facing on Cedar street and running south to the alley.

C. A. BALDWIN, called and sworn as a witness for the defendants, testified as follows:

I reside at Wallace; I am a carpenter and builder; I know Mr. Lane who lived in Wallace in 1887 or 1888. His place was on lot 5, block 22. I built a sidewalk for Mr. Lane, on the south side of block 22, from the corner of Sixth and Bank street to this building occupied by Mr. Lane; I think it was in front of lots one and three. At the time I built this walk, there was nothing there but some mud and stumps that Mr. Lane had cut out, and a couple of loose plank that was laid down on the ground. The planks were 14 to 16 feet long, thrown down in the mud, just laid over the worst parts of the mud; they were not fastened to anything; Mr. McKissick had nothing to do with building that sidewalk. Lane paid for it. I know the lots in controversy; I have known them ever since I came to town in April, 1887; I built the sidewalk late in the

fall of 1888. When I first saw the lots in controversy, there was a great many stumps on them, and I think a good deal of fallen timber; it couldn't be used for anything but firewood or something of that kind; the lots were in the same condition on the 19th of February as when I first saw them; there was no clearance of any kind, nor any buildings or improvements on either of the lots in controversy. I know how lots were selling in Wallace before and a little after the 12th of April, 1889. I think the two corner lots would be worth $500 or $600. Further up the street they would be worth not near as much, from $75 to $100 apiece. Cedar street was impassable at that time. It was laid out, but was not opened up.

115 Cross-examination by Mr. ALLEN:

On the 19th of February, 1889, I located 15 or 20 lots in the town of Wallace myself, and I have pretty near that many yet. At the time I built the sidewalk, Mr. Lane was Mr. McKissick's tenant in that building.

THOMAS F. HANLEY, being duly sworn for the defendant-, as a witness, testified as follows:

I reside in the town of Wallace; I have resided in Shoshone county pretty near eight years. In 1887 and 1888 I was sheriff of the county. By reason of my official position I frequently visited the town of Wallace; sometimes would stay there three or four days; there would be hardly a week but what I would have to go there. I went there to live in September, 1889. I was in Wallace frequently before 1888. The railroad got into Wallace in the fall of 1887. Up to near the 1st of December, 1887, it was impossible to travel on Sixth street from Arment's corner to Bank street. When the railroad got in there in the fall of 1887, there was a walk from the depot to the Arment house. Beyond that there was nothing; you had to pick your steps as you could through the mud. I asked Mr. Carter why he didn't build a sidewalk; he told me that when the railroad came in he would build a walk from the hotel to the corner of Sixth and Cedar streets; that was from the 20th to the 25th of September, 1887. There was considerable travel starting in at the northwest corner of block 22, following a little ridge where the water didn't run over, and running across and coming out on Bank street almost opposite the Heller house; when you struck Bank street on this trail, one trail went to the Heller house and one to Marks & Company's hardware store. The trail was used both before and after the building of the sidewalk until the travel was interrupted by the fences that Ruddy and others built. On the 19th of February, 1889, there was a great many stumps and snags, a great many logs, roots, &c., on the ground in controversy. There was no inclosures around or buildings or other improvements upon them. The lots were not occupied or used by any person for any purpose.

PAT. RYAN, called and sworn as a witness for and on behalf of the defendant-, testified as follows:

My home is in Missoula, Montana. I first went to Wallace in the fall of 1887; I went there to reside permanently on the 4th of July, 1888, and lived there until the 12th of July, 1889. Also lived there from November, 1890, until the 25th of August, 1891. I know the lots in controversy. On the 19th of February, 1889, these lots in controversy presented the appearance to me of an unoccupied portion of land off of which all the valuable timber had been moved, leaving nothing but some stumps and debris; some burned snags and some down timber; there was no fence around them. From the northwest corner of block 22 to the river Cedar street was impassable.
116 In the early days, the ordinary route of travel for pedestrians from the corner of Sixth and Cedar streets to the Heller house was on a trail that led diagonally across the block. It was in the same direction on the 19th of February, 1889, but was not used so much as it used to be. The sidewalk caused the diversion of the travel.

Cross-examination:

I think I fell off of that four-foot sidewalk.

W. D. MCFADDEN, being called and sworn as a witness for and on behalf of the defendant-, testified as follows:

I live in the town of Wallace; I have lived there since 1889. I have lived in Shoshone county since 1884. I am a painter and paperhanger by occupation. I am acquainted with the lots in controversy. I have known them since before the 19th of February, 1889. On the 19th of February they were covered with down timber, logs, very heavy stumps and some very large snags and broken-off trees. On the back part of the ground from lots 6 and 8, the lots were in a worse condition than they were in front; there was more logs, stumps and fallen timber on it. At that time Cedar street was almost impassable in front of these lots. Since the 19th of February I saw Mr. Hathaway cutting wood and timber on lots 22 and 24 and 16; they had some corded up there, but didn't notice particularly where. There was a good deal of wood corded up. On the 19th of February, these lots were not enclosed by anything, and there was no buildings or other improvements erected upon them.

Cross-examination:

I claim lots 13 and 11 on the south side of this block. I claim adversely to Mr. Carter.

Defendant- rests.

Plaintiff's Rebuttal.

Mr. CARTER was called and examined in rebuttal and testified as follows:

I heard the testimony of Mr. Hanley. I never *heard* any conversation with him relative to the sidewalk. I had very little ac-

quaintance with him. I furnished the lumber to build a sidewalk from Arment's over to the depot, at the request of Mr. Corbin; somewhere from the 10th to the 15th of March, 1888. There was no sidewalk there before to my recollection.

Cross-examination:

I don't remember that there was any sidewalk there before. I don't swear that there was not.

GEORGE I. BELL, being called and examined in rebuttal testified as follows:

There was no sidewalk to my knowledge leading from
117 Arment's corner to the depot prior to the construction of the sidewalk by Mr. Carter on the west side of block 22; there was a sort of a runway, occasionally a plank across a slough or hole or something of that kind. I don't wish to be understood that it was a continuous sidewalk.

Plaintiff rests.

Be it further remembered that on the 11th day of December, 1891, after the close of the evidence on the trial of this cause, and before the commencement of the argument to the jury, the plaintiff presented in writing to the court certain instructions numbered from 1 to 14 inclusive, and asked that each of the same be given by the court to the jury, which instructions are hereafter set forth.

And be it further remembered that after the close of the arguments of the counsel for the respective parties to the jury, the court of its own motion charged and instructed the jury on matters of law, as follows, to wit:

Charge to the Jury.

GENTLEMEN: I congratulate you that after listening patiently and carefully to this cause for a week, it is about to end and the responsibility to be placed upon you to determine the same.

Now, in this case as in all cases, more or less testimony will creep in that may not be deemed by you as very important, and that may not be strictly relevant, and I desire by my instructions to eliminate as far as possible all unnecessary testimony and direct your attention to the issues that you have to determine, and I will say to you now that while counsel in discussing a case before a jury must necessarily refer to what they deem to be the law, and the law they expect the court to give, yet it is your duty not to regard any law that counsel may have referred to, which is not in harmony with what the court will give. The court must take the responsibility of instructing you in the law and if it does not give it correctly as it is likely to err, as all courts are, the parties have relief by appeal and have the erroneous instructions which the court can give corrected by another court; so that you will therefore not be prejudiced in this case by any discussion of law, that may have been made before you by counsel; that you will pay strict attention to the law I

will give you, and base your action, after examining the facts in connection with the law, upon that.

Before I give instructions I will call your attention particularly to the pleadings in this case.

The complaint alleges that plaintiff on the 19th of February, 1889, was the owner, and was seized and possessed and entitled to the possession of a certain tract or parcel of land situated in the county of Shoshone, Territory of Idaho, described as follows, namely: The north half of block number 22 in the town of Wallace, in said county and Territory, as said half block is described on the plat of said town; said north half of said block 22 being bounded on the north by Cedar street, on the west by Sixth street, and on the east by 7th street, and on the south by an alley; the said half block being 300 feet long in an east and west, and 100 feet wide in a north
118 and south direction. That while the plaintiff was the owner of, seized, possessed and entitled to the possession of said north half of said block 22 in said town of Wallace, as aforesaid, the defendants afterwards, remark that, the defendants afterwards, namely: on the 19th of February, 1889, and without right, or title, entered into possession of the demanded premises and ousted and ejected plaintiff therefrom, and from the whole thereof, except a small parcel of the same designated on the map aforesaid, as lots 12 and 20 in said block. And then the plaintiff prays judgment against the defendants for the possession of the demanded premises and for the sum of, etc., dollars.

To that the defendants have — severally, each filing his own separate answer and denying generally the title and possession of the plaintiff to this property, and then each defendant sets up that on the 19th of February, 1889, or about that time, that he found this ground entirely unoccupied as public lands of the United States, and that he entered into the possession by reason of the fact that he found it unoccupied, and that he has since claimed and held possession under his entry.

That is what the pleadings state. I will refer to the pleadings further on in another portion of the instructions.

1st. Now, by the testimony in the case we have observed that the plaintiff for his title to the possession of the disputed lots relies first, upon an entry made in the land office at Cœur d'Alene City of this said and adjoining land by W. R. Wallace, as agent for one Walter Bourke with Sioux half-breed script, and a deed from the said Bourke by Wallace; and second upon his possession and improvements of the premises.

While the defendants claim plaintiff obtained no title whatever through his deed which was based upon the entry made upon said script, and that plaintiff did not have on February 19th, 1889, any such possession of the premises as the law required or as justified him in holding them, but that on said date the ground was vacant public land and not occupied by plaintiff or any one and while so situated the defendants in good faith entered into the possession and have since held the same.

2nd. This is in law termed, an action of ejectment. In such an

action the plaintiff must rely upon the strength of his own title, and not upon the weakness of his adversary's claim, and the burden of proof is on the plaintiff to show by a preponderance of evidence the superiority of his claim, and should he fail to show this the defendant would be entitled to continue in the possession.

Possession is always a *prima facie* evidence of title and a party in possession cannot be deprived of it by any one but the rightful owner or some one with a better right of possession.

It is admitted that defendants entered into possession of the premises on or about the 19th day of February, 1889, and that they were still in such possession when this action was commenced on the 12th day of April, 1889. The plaintiff must show he had a superior right over the defendants to the possession of the
119 premises, either by showing he had a title or by showing his possession prior to and at the time — defendants' entry.

3rd. For the purpose of establishing a legal title, the plaintiff introduced in evidence a certificate of entry in the land office at Cœur d'Alene City of the entry of 80 acres, including the ground in controversy, such entry having been made, or so claimed, by one Wallace as the agent of one Bourke, and upon what is known as Sioux half-breed script, and this is followed by a deed to plaintiff from said Wallace, as such agent for said Bourke, to the ground; but I now instruct you in an action like this in the U. S. courts such certificate issued by a land office of an entry of land cannot be received as any evidence of a legal title, and the deed referred to being based upon such entry cannot be considered as evidence of a legal title or of a title in fee, and as evidence of such title you will entirely disregard them, and that the only consideration you can give to either said certificate of entry or said deed is as evidence to explain plaintiff's original entry upon the premises, to explain his claim to the possession thereof, and to show his good faith in the claim he asserts.

Evidence has been introduced by defendants to show that this Sioux script has been cancelled and that all entries made under it, including the premises in dispute, are void; but this cannot effect the certificate of entry or the deed as evidence of plaintiff's good faith or as evidence for the purpose above stated unless it also appears to you from the evidence that the plaintiff knew when he accepted such deed of the invalidity of the Sioux script and the entry thereunder.

4th. The defendants do not show or claim any title in fee to the premises, and the plaintiff having failed to show any, it follows, so far as the evidence in this case advises us, that the real title still remains in the Government of the United States. It then results that there is but one question left for your determination, to wit, had the plaintiff at the time defendants entered upon this ground, on the 19th day of February, 1889, such possession, and was he then exercising such control and ownership and possession over the premises as gave him a superior right to its possession over that which the defendant took. If he was then in the lawful possession of it, the defendant- had no right to enter upon it and cannot hold

the possession they took. If the plaintiff was not then in the lawful possession, the defendants had the right to enter and can remain therein.

5th. It appears, therefore, that the title to the premises was at the time referred to in this action and appears still to be in the Government of the United States. All possessory rights and all titles to be procured for the public lands of the United States must be regulated and controlled by the laws of the United States, and in consideration of any question relating to such land we must keep in view the policy and the general rules and laws of the Government and the decisions of its courts thereunder applicable to its lands and their disposal, and any law of this State providing any way for the disposal of occupation of such public lands which is not in harmony with such United States laws and decisions of the United States courts must disregarded.

120 6th. The Government has pointed out specific modes by which titles to its lands can be procured—by pre-emption, homestead, and otherwise. It has also a statute providing for the entry of lands for town-site purposes, and in addition to all these specific laws it does permit as a part of its policy, without any written law, persons to go upon its public lands when not reserved and hold the possession thereof without title as against all other persons having no better title or right.

While it appears in this case that the tract of land in controversy, including that in dispute, was in June, 1886, platted and surveyed as a town site, and that plaintiff took his deed for a block of ground as so platted, it does not appear that such platting of such town was made in pursuance of the general town-site act, or of any law or statute, and the plaintiff's rights are not measured by such town-site act, but his rights depend upon such right of possession on which the Government permits its citizens to take and hold to its public lands until superseded by some better title. The defendants are proceeding, as we understand, to procure title under the town-site law referred to, and while under this law a perfect title may be procured it does not authorize parties to organize into a town lots in the lawful possession of some other person without his consent. If, therefore, plaintiff was at the time alleged, February 19, 1889, in the lawful possession of the land, any attempt to organize it into a town under such act cannot operate to deprive him of such lawful possession.

The 7th instruction. What, then, is the possession plaintiff must have had to entitle him to recover? It will be seen from plaintiff's complaint that he does not treat the premises sued for as distinct lots or parcels of land, but he alleges his possession to the north half of block 22 and describes it all as one tract bounded by certain boundary lines, and while he was in possession of all this tract on said 19th day of February, the defendants afterwards, on that day, ejected him from all of it except a small parcel thereof, designated on the plat as lots 12 and 20, and the plaintiff claims he held and treated it all as one tract, and that it was not marked off on the ground by any monuments into separate and distinct tracts or lots;

also plaintiff claims that upon this ground—this north half of the block—he had a tenant in one part of it. The defendants claim this half block was not only platted into separate and distinct lots, but it was surveyed and marked on the ground.

It is the law that where a party holds a tract of land as a separate and distinct tract and as one tract under a claim of title as the boundaries of the tract are so designated, described, and marked that they may be known, his possession, either by himself or tenants, of a part of the tract operates as possession of all.

If in this case you find that this half block was held by plaintiff as one tract or parcel of land, and that it was so marked out and designated in any way that defendants could know its location and plaintiff had possession of any part of it, such possession extended to and gave him possession of the entire tract; but if, on the contrary, it was cut up into separate and distinct lots and so
121 marked upon the ground and was held and treated as distinct tracts, then he must show the possession of all thereof.

8th instruction. Neither the government or its courts have established any absolute, unbending rule applicable alike to all lands requiring certain specific enclosures, improvements or residence thereon to establish a possessory right thereto; but the kind of an inclosure or improvement or residence depends largely upon the nature of the land and the use to which it is devoted. If the land is for agricultural purposes it must be fenced; if for supplying timber it need not be, or as in one case once before the Supreme Court of the United States, if it is a town lot used only for the digging of sand therefrom it need not be inclosed or otherwise improved. So far as inclosures are required by law for town lots it is for the purpose of giving notice that some one claims the premises. Any other improvements or objects placed upon the ground or any other acts done concerning it which will operate to give such notice to the world will, under the law which governs us, be equivalent to such inclosure, but in all cases the improvements on the land, or acts done concerning it must be of such a nature as to clearly give to the world such notice of claim and possession.

9th. It is a part of the policy of the Government to require as a condition of the alienation of its lots that they shall be improved and occupied for some beneficial purpose, and while it does not declare the use to which they shall be devoted, it does not design that its citizens shall hold its lands by a simply possessory title without improvement or in an uncultivated state for speculation, but where such lands are held the holder must show by his acts it is for some useful purpose and with a view of developing and improving it. If it is for a mining claim he must work it; if a pre-emption claim he must improve it; if a timber claim he must plant it, and if a desert entry he must water it. And in the case of any kind of property the Government requires that such reasonable improvements shall be made as will fit it for the use to which it was to be appropriated, and show the good faith of the claimant; but it does not require a hardship or that such improvements shall be made of such a char-

acter or made in such time as to make his possession onerous or burdensome.

10th. It is not necessary that a claimant must be in the constant actual possession of the ground—that is, to be upon it in person or by an agent, but he may have a constructive possession of it by exercising such acts of ownership over it as to clearly indicate his claim to and possession of it; but these acts must be so continuous, notorious and public as to operate as a constant notice to the world of his claim.

In this case it is the question for you to investigate whether the acts done by the plaintiff, his improvements to be made on or the possession he had to such ground were such as would fairly notify the defendants of his claim and possession.

11th. The next question is, what are the acts of ownership and possession to which your attention must be directed. As acts of ownership and possession the plaintiff claims he entered upon
122 the premises in good faith in pursuance of his deed; that he thereupon proceeded to clear the land of its timber and to prepare it for occupation. That he put sidewalks along the sides of a portion of it, that he put them there as the owner of the ground for its convenient use and to improve and enhance its value. That as such owner and claimant he caused water to be conducted to some part of the premises—that he paid taxes on the premises, and that he has always, since purchasing the ground claimed to own it, and has openly and publicly exercised control over it.

If these assertions of plaintiff are true and that these acts were done by him or by his agents you are instructed that they constituted in him such a possessory title to the premises in dispute as the Government will protect and as against any other person claiming by a similar or subsequent possessory title.

12th. On the contrary the defendants claim that the plaintiff's entry on the land was not in good faith to hold it, that his object was to cut therefrom for milling purposes the timber thereon; that he did not clear the land; that the sidewalks were not constructed for the benefit of the property, or because plaintiff owned it, but to benefit and add to the convenient use of other property he owned and business he was operating in that vicinity. That the water he had conducted there was not to benefit the premises but was a part of the town system of water works, and that the plaintiff had through himself or his agents ceased to exercise control over the property, and that on the 19th day of February, 1889, it was vacant, unoccupied lands of the United States, and that on such day they peaceably entered the premises.

If you find the claim of the defendants to be true then their entry and possession was lawful.

Now, gentlemen, you will mark that I have attempted to state the claim of the two parties and the evidence which they rely upon. I have tried to keep from you any views that I may entertain as to the weight of the evidence and I will ask you now in taking the case that you will disregard anything but the real rights of these parties. How much has been said here about the real rights of these parties.

Much has been said here about the good or bad faith with which these parties have entered and the possession and standing of the plaintiff and perhaps some things have been said that might tend to prejudice you. I want to say to you that you are in the position of a court; it is your duty to disregard anything that tends to prejudice your judgment in the least and to listen only or take only under your consideration the law applicable to the case and the evidence—to determine between these two parties according to the law and the evidence that has been placed before you. The duty resting upon you is as solemn as the one resting on the court. The court has attempted to the best of its ability to allow to be placed before you that which is fair and just to both parties and what you are entitled to hear and know. It is your duty to give these parties a fair and impartial ruling and try to reach just conclusions in the case.

123 As you are aware it is a matter involving a good deal—of considerable importance and the case has required a good deal of time and has put the parties to an immense amount of expense, and it is your duty to consider it in all particulars and try to reach a just conclusion in the matter.

As to your verdict. After looking over all the evidence in the case either the plaintiff is entitled to a judgment against the defendant-, or else all the defendants are entitled to a judgment against the plaintiff. In other words, either the plaintiff is entitled to the possession of the ground in controversy or the defendants are and I do not deem it necessary as counsel has requested to require you to find special or separate verdicts. In fact I think to give an instruction of that kind would only confuse you and put the case in a worse condition; therefore your verdict will be either for the plaintiff or for the defendants, and upon such a verdict as that the court will be able to render a judgment which will be proper in the case. The body of the verdict is this: "We, the jury in the above-entitled cause find for the — either plaintiff or defendant-, as you conclude, and the foreman whom you select will sign that verdict."

And that no other charges or instructions were given by the court to the jury, and the court refused to give to the jury each and all of said instructions asked for by the plaintiff.

And be it further remembered that at the conclusion of the said charge of the court to the jury, and before the jury left the box, the plaintiff handed to the court in writing the following exceptions to the charge of the court, and the court's refusal to give instructions asked by plaintiff, viz:

The plaintiff excepted to that portion of the charge of the court to the jury, in words as follows: "But I now instruct you that in an action like this in the United States courts, such certificates issued by a land office of an entry of land cannot be received as any evidence of legal title, and the deed referred to being based upon such entry cannot be considered as evidence of legal title, or of a title in fee, and as evidence of such title you will entirely disregard them, and that the only consideration you can give to either said certificate of entry, or said deed is as evidence to explain plaintiff's origi-

nal entry upon the premises; to explain his claim to the possession thereof, and to show his good faith in the claim he asserts."

Plaintiff also excepts to that part of the charge of the court after the words, "The defendants do not show or claim any title in fee to the premises" and before the words "it follows" said part so excepted to being as follows: "And the plaintiff having failed to show any."

The plaintiff also excepts to the following portion of the charge of the court, to wit: "It appearing therefore that the title to the premises was at the time referred to in this action, and appears still to be in the Government of the United States."

The plaintiff also excepts to the following portion of the charge of the court, to wit: "But if, on the contrary, it was cut up into separate and distinct lots and so marked upon the ground, and was held and treated as distinct tracts, then he must show the possession of all thereof."

124 Plaintiff also excepts to all that part of the charge of the court in words and figures as follows, to wit: "It is a part of the policy of the Government to require as a condition to the alienation of its lots that they shall be improved and occupied for some beneficial purpose, and while it does not declare the use to which they shall be devoted, it does not design that citizens shall hold its land by simply possessory title without improvements or in an uncultivated state for speculation, but where such lands are held the holder must show by his acts it is for some useful purpose, and with a view of developing and improving it. If it is for a mining claim he must work it; if a pre-emption claim he must improve it; if a timber claim he must plant it, and if a desert entry he must water it, and in the case of any kind of property the Government requires that such reasonable improvement shall be made as will fit it for the use to which it was to be appropriated, and show the good faith of the claimant; but it does not require a hardship or that such improvements shall be of such a character or made in such time as to make his possession onerous or burdensome."

Plaintiff also excepts to all that portion of the charge of the court in words as follows:

"I will ask you now, in taking the case, that you will disregard anything but the real rights of these parties. Much has been said here about the good or bad faith with which these parties have entered and the possession and standing of the plaintiff, and perhaps some things have been said that might tend to prejudice you. I want to say to you that you are in the position of a court; it is your duty to disregard everything that tends to prejudice your judgment in the least, and to listen only, or take only under your consideration, the law applicable to the case and the evidence, to determine between these two parties according to the law and the evidence that has been placed before you."

Plaintiff also excepts to the refusal of the court to give to the jury the first instruction asked by plaintiff, which instruction is as follows:

"The plaintiff has introduced evidence showing that, prior to the

entry of defendants upon the north half of block 22, the plaintiff had erected two houses on the said north half of said block, and that at the time of the entry of the defendants the plaintiff was in the actual possession of at least one of these houses, by his tenant, and such possession is the actual possession of all the said north half of said block 22, and your verdict must be for the plaintiff."

Plaintiff also excepts to the refusal of the court to give the second instruction asked for by plaintiff, which instruction is as follows:

"The jury are instructed that if they believe that plaintiff had erected two houses on the north half of block 22 prior to the entry of the defendants, and at the time of such entry by defendants was in the actual occupancy of either of said houses, by himself or his tenant, then the plaintiff is entitled to recover."

Plaintiff also excepts to the refusal of the court to give the third instruction asked for by plaintiff, which instruction is as follows:

"In determining the question of whether the plaintiff had
125 possession of the premises in controversy at the time of the entry of the defendants, I instruct you that it is not necessary that the land be enclosed with a fence, or that the plaintiff actually reside upon it, or that he remain upon the land, or even that he keep an agent or tenant constantly upon the land, and, if you find from the evidence that the plaintiff entered upon the north half of block 22, in the town of Wallace, which includes the premises in controversy, claiming the whole thereof, and that the boundaries thereof were distinctly marked upon the ground, and were well known and that he exercised acts of ownership over the same, by clearing off the timber, and by the construction of two houses thereon, and by building sidewalks and that same were done for the purpose of improving the same, and that he paid the taxes thereon, and that these acts of plaintiff were open and notorious, then I instruct you that such acts would constitute possession by the plaintiff of the whole of the north half of the block.

"And I further instruct you that such possession of the plaintiff would give him, plaintiff, title, upon which he may recover against the defendants."

Plaintiff also excepts to the refusal of the court to give the fourth instruction asked for by the plaintiff, which instruction is as follows:

"If the jury find from the evidence that the plaintiff was in the possession of the premises in controversy within the meaning of the terms as I have defined them, at a time prior to the entry of the defendants, then I instruct you that such possession is presumed to continue until entry thereon by the defendants, and the burden is upon the defendants to show that plaintiff had abandoned his possession to the ground in controversy at the time they entered, and in determining the question of abandonment you may consider the payment of taxes on the land by the plaintiff as well as all his other acts relating to the premises."

Plaintiff also excepts to the refusal of the court to give the fifth instruction asked for by plaintiff, which instruction is as follows:

"In determining the question of whether the plaintiff entered into possession of the whole north half of the block 22 the jury are to consider the deed given in evidence as well as the subsequent payment of taxes upon the land by the plaintiff."

Plaintiff also excepts to the refusal of the court to give the sixth instruction asked for by plaintiff, which instruction is as follows:

"The jury are instructed that in determining the question of whether the plaintiff was in possession of the premises in controversy at the time of the entry by the defendants, it is not necessary that the plaintiff should have been an inhabitant or actual resident of the town of Wallace, or that he actually resided upon the premises in controversy or any part thereof, or that the premises be enclosed with a fence or that there should be a building upon any of the lots in controversy."

Plaintiff also excepts to the refusal of the court to give the seventh instruction asked for by the plaintiff, which instruction is as follows:

"The jury are instructed that if the plaintiff entered upon
126 the premises in controversy under a deed from Walter Bourke, introduced in evidence claiming title to all of block 22, in good faith under said deed, and erected buildings or made other improvements upon a portion of said block, and that the said premises were not in the adverse possession of any one at the time he so entered, and that under his said claim of ownership under said deed he cleared the whole or a portion of said block, then I instruct you that his possession of a part of the premises described in said deed would be a possession of the whole block, including the ground in controversy; and if you find that the plaintiff did not subsequently abandon said premises, but still continued to claim the same and exercise acts of dominion and control over the same, claiming under said deed, then I instruct you that the defendants could not obtain any rights in the premises by an entry thereon. That such possessions of the plaintiff would give him the title to the premises as against the defendants."

Plaintiff also excepts to the refusal of the court to give the eighth instruction asked for by plaintiff, which instruction is as follows:

"Possession may be evidenced in several ways. First. By an actual residence upon the property, or by an enclosure or by making improvements thereon, or by cultivating the same or by any other acts that are open and notorious that show that he exercised a dominion and control over the same, and that among such acts may be enumerated the cutting of timber and clearing of the land, and the payment of taxes thereon."

Plaintiff also excepts to the refusal of the court to give the ninth instruction asked for by plaintiff, which instruction is as follows:

"If you believe from the evidence that the plaintiff entered upon and took possession of block 22 in the town of Wallace, under and by virtue of the deed from Walter Bourke, introduced in evidence; that he immediately went upon, occupied and improved and continued to occupy the said block of land, and asserted his claim and possession to the whole of said block under said deed, and no other

persons was in adverse possession of any portion thereof up to the time when the defendants entered thereon, and never abandoned the same, and that the premises in controversy in this suit are within the boundaries of said block 22, you will find for the plaintiff."

Plaintiff also excepts to the refusal of the court to give to the jury the tenth instruction asked for by the plaintiff, which instruction is as follows:

"The jury are instructed that a fence, building, or other improvement is not essential to plaintiff's right to recover if plaintiff show acts of ownership under claim of right, visible and notorious. Such acts are sufficient to authorize the jury to find such possession."

Plaintiff also excepts to the refusal of the court to give to the jury the eleventh instruction asked for by the plaintiff, which instruction is as follows:

"The jury are instructed that the uninterrupted payment of taxes on the land is powerful evidence of a claim of right to it."

Plaintiff also excepts to the refusal of the court to give to
127 the jury the twelfth instruction asked for by the plaintiff, which instruction is as follows:

"The jury are instructed that neither actual occupation, cultivation or residence are necessary to constitute actual possession."

Plaintiff also excepts to the refusal of the court to give to the jury the thirteenth instruction asked for by the plaintiff, which instruction is as follows:

"Mere possession is a good title against a stranger having no title, a mere intruder cannot enter upon a person seized, eject him, and when sued question on his title or set up any outstanding title in another. The prior peaceable possession of the plaintiff is enough to enable him to recover in ejectment against one having no title."

Plaintiff also excepts to the refusal of the court to give the fourteenth instruction asked for by plaintiff, which instruction is as follows:

"The invalidity of plaintiff's grant is not a defense of which the defendant can take advantage in this case, if the plaintiff had reduced this property in dispute to his dominion and control, paid taxes thereon, cleared the trees therefrom, put sidewalk along the west side, along the greater part of the north side, and a part of the south side thereof, and the same was marked upon the ground by stakes set at the corners of the lots in question, and at the corners of the block, marking the streets and alleys, at the time of the entry of the defendants, then you should find that the plaintiff was in possession of the ground in controversy, and the entry of defendants was unlawful."

Wherefore, to the end that the errors in law, if any, committed by the court in its charge to the jury, and in its refusal to charge as requested by the plaintiff, may appear, this the plaintiff's bill of exceptions to the charge of the court to the jury, and for the refusal of the court to charge the jury is settled, allowed, signed and sealed, and made a record in the cause.

By the court:

JAS. H. BEATTY, *Judge.*

Dated this 19th day of March, 1892.

Endorsed as follows: In the circuit court of the United States, district of Idaho. Edwin D. Carter *vs.* Charles Ruddy *et al.* Bill of exceptions. Filed Jan. 30th, 1892. A. L. Richardson, clerk. Filed as settled March 19th, 1892. A. L. Richardson, clerk.

Petition for Writ of Error.

In the Circuit Court of the United States in and for the District of Idaho.

EDWIN D. CARTER, Plaintiff and Appellant,
vs.
CHARLES RUDDY, CHARLES ROBBINS, MICHAEL MCMURRAY, FREDERICK A. STEVENS, M. J. DONNELLY, C. M. PATTERSON, JOHN DOE, and RICHARD ROE, Defendants and Respondents.

128 Petition for writ of error.

The above-named plaintiff, Edwin D. Carter, conceiving himself aggrieved by the decision and judgment of this court entered on the 16th day of Dec., 1891, in the above-entitled action doth pray for his writ of error from said decision and judgment to the United States circuit court of appeals in and for the ninth judicial circuit of the United States, and prays that his writ of error may be allowed and that a transcript and record of the proceedings upon which said judgment duly authenticated may be sent to the said court of appeals.

McBRIDE & ALLEN,
WOODS & HEYBURN,
Att'ys for Pl't'f in Error.

And now, to wit, on this the 25th day of May, 1892, it is ordered that the said petition be allowed as prayed for.

JAS. H. BEATTY, *Judge.*

Endorsed: Filed May 25th, 1892. A. L. Richardson, clerk.

Assignment of Errors.

And now comes the plaintiff and upon the foregoing record assigns the following errors, to wit:

The court erred in rejecting the paper marked "Exhibit J" of plaintiff, being the notice addressed by the plaintiff E. D. Carter by his authorized agent G. I. Bell on the 27th day of February, 1889, to the defendants, Charles Ruddy and M. Murray, which notice set forth the claim of the plaintiff to the property in dispute and that he claimed it by right of possession and by occupation and improvement.

2nd. The court erred in rejecting the testimony of the said Bell as to posting notice in the month of February, 1889, on the block of ground which this action is brought to recover, in which notice

the plaintiff offered to prove that the said Carter claimed the ground in controversy, and notified parties of his claim thereto.

3rd. The court erred in permitting the defendants to introduce and read in testimony Exhibit No. 1 in the record, being the petition of the plaintiff for the transfer of this case to the circuit court of the United States and the reasons therefor.

4th. The court erred in admitting Defendants' Exhibit No. 2, being the decision of the Commissioner of the General Land Office canceling the entry of Walter Bourke, being the Sioux half-breed scrip covering the land in controversy, the same being incompetent, immaterial and irrelevant.

6th. The court erred in admitting in evidence the notice of R. E. McFarland, register of the land office to W. R. Wallace, marked "Defendants' Exhibit No. 3."

7th. The court erred in admitting in evidence the power of attorney from Walter Bourke to Mr. Wells marked "Defendants' Exhibit 4," by which said Wells is alleged to have made certain entries for other lands than those now in controversy.

8th. The court erred in admitting in evidence copies of the
129 original and duplicate scrip marked "Defendants' Exhibit No. 5" in record; and also erred in refusing to strike out the same for the reasons assigned in the record. It was incompetent, immaterial and irrelevant in this action.

9th. The court erred in admitting in evidence the paper marked "Defendants' Exhibit No. 6," being copy of the patent issued to Walter Bourke, founded on location made with Sioux half-breed scrip No. 430 C at Fargo, Dakota Territory, R. and R., and the patent following the same.

10th. The court erred in permitting to be received in evidence those certain papers connected with duplicate of like papers Sioux half-breed scrip No. 430, letter C, for 80 acres of land and marked as "Defendants' Exhibit No. 7" in this record.

11th. The court erred in admitting in evidence the two maps showing the line of the railroad, the Northern Pacific railroad, it not appearing that the lands in controversy were railroad lands, and marked "Exhibit 8 and 9" in the record.

12th. The court erred in admitting in evidence articles of incorporation of the town of Wallace, marked "Exhibit No. 10," and read in evidence to the jury.

13th. The court erred in admitting the map marked "Defendants' Exhibit No. 13," said map having been made long after the purchase by plaintiff of the property in dispute and there being no evidence that he had any knowledge of its existence when purchased with reference to it at the time it was made.

14th. The court erred in admitting in evidence the notice signed by Ruddy, marked "Exhibit 13" and dated the 19th of February, 1889, claiming lots 2 and 3 in block 22, Shoshone county, Idaho, the same being immaterial, irrelevant and conferring no right upon the plaintiff.

15. The court erred in admitting in evidence Defendants' Exhibit

14, being notice of Murray to lots 6 and 8 in block 22, the same being incompetent, immaterial and irrelevant.

16th. The court erred in its charge to the jury, which is found in words as follows:

"But I now instruct you that in an action like this in the United States courts such certificate issued by a land office of an entry of land cannot be received as any evidence of legal title, and the deed referred to being based upon such entry cannot be considered as evidence of a legal title or of a title in fee, and as evidence of such title you will entirely disregard them, and that the only consideration you may give to either said certificate or entry or said deed is as evidence to explain plaintiff's original entry upon the premises, to explain his claim to the possession thereof and to show his good faith in the claim he asserts."

The effect of said charge being to entirely destroy all right of the plaintiff occurring out of the location of the scrip, the certificate of entry from the United States authorizes thereunder and his warranty deed under which he took possession of the land, and was therefore erroneous.

130 17th. The court erred in that part of its charge to the jury which is in following words:

"The defendants do not show or claim any title in fee to the premises" and before the words "it follows said part so excepted to," and the plaintiff having failed to show any.

Because the evidence shows that the plaintiff entered under a warranty deed based upon the regular certificate of purchase from the Government of the United States and had *prima facie* a title in form, and his possession was based thereon.

18th. The court erred in that portion of the charge which is in the following words:

"It appearing, therefore, that the title to the premises was at the time referred to in this action and appears still to be in the Government of the United States."

Because it appeared from the testimony that the land had been purchased under the Sioux half-breed scrip, and that the title had been conveyed by a warranty deed from the grantee of the Government to the plaintiff in this action.

19th. The court erred in the following portion of its charge:

"But if, on the contrary, it was cut up into separate and distinct lots and so marked upon the ground and was held and treated as distinct tracts, then he must show the possession of all thereof."

Because the testimony does not show that this state of facts existed, and it does appear from the testimony that at the time of Carter's purchase it had not been cut up into separate and distinct lots, and was not so marked upon the ground, and was not held and treated as separate and distinct tracts, but was held by Carter as a single parcel of ground.

20th. The court erred in that portion of its charge which is in words as follows:

"It is a part of the policy of the Government to require as a condition to the alienation of its lots that they shall be improved and

occupied for some beneficial purpose, and while it does not declare the use to which they shall be devoted, it does not design that citizens shall hold its land by simply possessory title without improvement or in an uncultivated state for speculation, but where such lands are held the holder must show by his acts it is for some useful purpose and with a view of developing and improving it; if it is for a mining claim he mu-t work it; if a pre-emption claim he must improve it; if a timber claim he must plant it, and if a desert entry he must water it, and in the case of any kind of property the Government requires that such reasonable improvements shall be made as will fit it for the use to which it was to be adapted and show the good faith of the claimant, but it does not require a hardship, or that such improvements shall be of such a character or made in such time as to make his possession onerous or burdensome."

Said instruction being misleading, calculated to prejudice the jury, and being erroneous as matter of law, and having no application to the circumstances of this case.

131 21st. The court erred in that portion of its charge which is in words as follows:

"I will ask you now in taking the case that you will disregard anything but the real rights of these parties. Much has been said here about the good or bad faith with which these parties have entered and the possession and standing of the plaintiff and perhaps some things have been said that might tend to prejudice you. I want to say to you that you are in the position of a court; it is your duty to disregard everything that tends to prejudice your judgment in the least and to listen only or take only under your consideration the law applicable to the case and the evidence to determine between these two parties just as you deem the law according to the evidence that has been placed before you."

Said instruction being misleading, as leaving the jury to infer that the right of the plaintiff was determined upon some other rule than the prior possession and the ownership of the property under the conveyance which has been made to him.

22nd. The court erred in refusing to give to the jury the 1st instruction asked for by plaintiff, which was in words as follows:

"The plaintiff has introduced evidence showing that prior to the entry of defendants upon the north half of block 22, the plaintiff had erected two houses on the said north half of said block, and at the time of the entry of the defendants the plaintiff was in the actual possession of at least one of these houses by his tenant, and such possession is the actual possession of all the said north half of said block 22 and your verdict must be for the plaintiff."

23d. The court erred in refusing to give the 2nd instruction asked for by plaintiff, which was in words as follows:

"The jury are instructed that if they believe that plaintiff had erected two houses on the north half of block 22 prior to the entry of the defendants, and at the time of such entry by defendants was in the actual occupancy of either of said houses, by himself or his tenants, then the plaintiff is entitled to recover."

24th. The court erred in refusing to give to the jury the 3d instruction asked for — plaintiff, which was in words as follows:

"In determining the question of whether the plaintiff had possession of the premises in controversy at the time of the entry of the defendants, I instruct you that it is not necessary that the land be enclosed with a fence, or that the plaintiff actually reside upon it, or that he remain constantly upon the land, or even that he keep an agent or tenant constantly upon the land, and if you find from the evidence that the plaintiff entered upon the north half of block 22 in the town of Wallace, which includes the premises in controversy, claiming the whole thereof, and that the boundaries thereof were distinctly marked upon the ground, and were well known, and that he exercised acts of ownership over the same by clearing off the timber, and by the construction of two houses thereon, and by building sidewalks, and that the same were done for the purpose of improving the same, and that he paid the taxes thereon, and
132 that these acts of plaintiff were open and notorious, then I instruct you that said acts would constitute possession by the plaintiff of the whole of the north half of the block."

"And I further instruct you that such possession of the plaintiff would give him (plaintiff) title, upon which he may recover against the defendants."

25th. The court erred in refusing to give to the jury the 4th instruction asked for — plaintiff, which was in words as follows:

"If the jury find from the evidence that the plaintiff was in the possession of the premises in controversy within the meaning of the term as I have defined them, at the time prior to the entry of the defendants, then I instruct you that such possession is presumed to continue until entry thereon by the defendants, and the burden is upon the defendants to show that plaintiff had abandoned his possession to the ground in controversy at the time they entered, and in determining the question of abandonment you may consider the payment of taxes on the land by plaintiff as well as all his other acts relating to the premises."

26th. The court erred in refusing to give to the jury the 5th instruction asked for by plaintiff, which was in words as follows:

"In determining the question of whether the plaintiff entered into possession of the whole north half of the block 22, the jury are to consider the deed given in evidence as well the subsequent payment of the taxes upon the land by the plaintiff."

27th. The court erred in refusing to give to the jury the 6th instruction asked for by plaintiff, which was in words as follows:

"The jury are instructed that in determining the question of whether the plaintiff was in possession of the premises in controversy at the time of the entry of the defendants, it is not necessary that the plaintiff should have been an inhabitant or actual resident of the town of Wallace, or that he actually resided upon the premises in controversy or any part thereof or that the premises be enclosed with a fence, or that there should be a building upon any of the lots in controversy."

28th. The court erred in refusing to give to the jury the 7th instruction asked for by plaintiff, which was in words as follows:

"The jury are instructed that if the plaintiff entered upon the premises in controversy under a deed from Walter Bourke, introduced in evidence, claiming title — all block 22, in good faith, under said deed, and erected buildings or made other improvements upon a portion of said block, and that the said premises were not in the adverse possession of any one at the time he so entered, and that under said claim of ownership under said deed he cleared the whole or a portion of said block, then I instruct you that his possession of a part of the premises described in said deed would be a possession of the whole block including the ground in controversy; and if you find that the plaintiff did not subsequently abandon said premises, but still continued to claim the same, and exercised acts of dominion and control over the same, claiming under said deed, then I instruct you that the defendant- could not obtain any right in the
133 premises by an entry thereon. That such possession of the plaintiff would give him the title to the premises as against the defendant-."

29th. The court erred in its refusal to give to the jury the 8th instruction asked for by plaintiff, which was in words as follows:

"Possession may be evidenced in several ways—First. By an actual residence upon the property, or by an inclosure or by making improvements thereon, or by cultivating the same, or by any other acts that are open and notorious that shows that he exercises a dominion and control over the same; and that among such acts may be enumerated the cutting of timber and clearing of land, and the payment of taxes thereon."

30th. The court erred in refusing to give to the jury the 9th instruction asked for by plaintiff, which was in words as follows:

"If you believe from the evidence that the plaintiff entered upon and took possession of block 22 in the town of Wallace, under and by virtue of a deed from Walter Bourke, introduced in evidence; that he immediately went upon, occupied and improved and continued to occupy the said block of land and asserted his claim and possession to the whole of said block under said deed and no other persons *was* in adverse possession of any portion thereof up to the time when the defendants entered thereon, and never abandoned the same, and that the premises in controversy in this suit are within the boundaries of said block 22—you will find for the plaintiff."

31st. The court erred in refusing to give the 10th instruction asked for by plaintiff, which was in words as follows:

"The jury are instructed that a fence, building or other improvement is not essential to plaintiff's right to recover, if plaintiff shows acts of ownership under claim of right visible and notorious. Such acts are sufficient to authorize the jury to find such possession."

32nd. The court erred in its refusal to give the 11th instruction asked for by plaintiff, which was in words as follows:

"The jury are instructed that the uninterrupted payment of taxes on the land is powerful evidence of a claim of right to it."

33rd. The court erred in its refusal to give to the jury the 12th

instruction asked for by plaintiff, which was in the following words:

"The jury are instructed that neither actual occupation, cultivation or residence are necessary to constitute actual possession."

34th. The court erred in its refusal to give the 13th instruction asked for by plaintiff, which was in the following words:

"Mere possession is a good title against a stranger having no title, a mere intruder cannot enter upon a person seized, eject him, and when sued question on his title or set up any outstanding title in another. The prior peaceable possession of the plaintiff is enough to enable him to recover in ejectment against one having no title."

Endorsed as follows: No. 20. In the U. S. circuit court, district of Idaho. Edwin D. Carter *vs.* Chas. Ruddy *et al.* Assignment of errors. Filed May 25th, 1892. A. L. Richardson, clerk.

134 *Bond on Writ of Error.*

Clerk of the United States circuit court of appeals for the ninth judicial circuit of the United States:

Know all men by these presents that we, E. H. Moffitt and John W. Livers, of the State of Idaho and residents and householders therein, are held and firmly bound, jointly and severally, by these presents unto Charles Ruddy, Charles Robbins, Michael McMurray, Frederick A. Stevens, M. J. Donnelly, C. M. Patterson, John Doe, and Richard Roe, defendants, in the just and full sum of five hundred dollars, lawful money of the United States, to be paid to the said obligees, their executors, administrators, or assigns; to which payment, well and truly to be made, we bind our heirs, executors, and administrators firmly by these presents.

Sealed with our seals and dated this 23d day of April, in the year of our Lord one thousand eight hundred and ninety-two.

Whereas lately, in a suit then pending in the circuit court of the United States in and for the district of Idaho between the said Edwin D. Carter, as plaintiff, and the said Charles Ruddy, Charles Robbins, Michael McMurray, Frederick A. Stevens, M. J. Donnelly, C. M. Patterson, John Doe, and Richard Roe, defendants, a judgment was — against said plaintiff, and the said plaintiff having taken his writ of error therefrom to the United States circuit court of appeals for the 9th judicial circuit of the United States, praying for a reversal thereof, and the same has been allowed, and a writ of error thereon has been issued to the said defendants, admonishing — to be and appear at the United States circuit court of appeals for the ninth judicial circuit of the United States, to be holden at the city of San Francisco the 1st day of July, A. D. 1892:

Now, the condition of this obligation is such that if the said plaintiff in error shall prosecute his writ of error to effect and answer all damages and costs if he shall fail to make his plea good, *and* then

the above obligation to be void; else to remain in full force and virtue.

E. H. MOFFITT. [SEAL.]
J. W. LIVERS. [SEAL.]

Sealed and delivered in presence of—
A. E. ANGEL.
W. H. BROWN.

STATE OF IDAHO, }
County of Shoshone, } *ss:*

E. H. Moffitt and John W. Livers, being first duly sworn according to law, deposes as follows: I am the person who signed the foregoing bond, and I state that I am worth the sum specified therein over and above my just debts and liabilities, exclusive of property which is exempt from execution, and that I am a resident and householder of said State and county.

E. H. MOFFITT.
J. W. LIVERS.

Subscribed and sworn to before me this 23d day of April, 1892.
[SEAL.] A. E. ANGEL,
Notary Public.

135 I hereby certify that the obligors in the foregoing bond are persons of pecuniary responsibility, and that said bond is good and sufficient and I hereby approve the same.

JAS. H. BEATTY,
Judge Circuit Court, District of Idaho.

(Endorsed:) No. 20. U. S. circuit court, district of Idaho. Edwin D. Carter *vs.* Chas. Ruddy *et al.* Bond on writ of error. Filed May 25th, 1892. A. L. Richardson, clerk.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Charles Ruddy, Charles Robbins, Michael McMurray, Frederick A. Stevens, M. J. Donnelly, C. M. Patterson, John Doe, and Richard Roe, Greeting:

You are hereby cited and admonished to be and appear at a United States circuit court of appeals for the ninth circuit, to be holden at the city of San Francisco, in the State of California, on the 25th day of June next, pursuant to a writ of error on file in the clerk's office of the circuit court of the United States for the district of Idaho, wherein Edwin D. Carter is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff as in the writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Jas. S. Beatty, acting judge of the United States circuit court for the district of Idaho, this 25th day of May, A. D. 1892.

JAS. H. BEATTY, *Judge.*

Service of the within citation, by copy, admitted this 27th day of May, 1892.

L. VINEYARD,
One of Def'ts' Att'ys.

Endorsed: No. 20. U. S. circuit court for the ninth circuit, district of Idaho. Edwin D. Carter *vs.* Chas. Ruddy *et al.* Citation. Filed May 27th, 1892. A. L. Richardson, clerk.

Certificate to Transcript.

In the Circuit Court of the United States *of* the Ninth Judicial Circuit, District of Idaho.

EDWIN D. CARTER
vs.
CHARLES RUDDY *et al.*

I, A. L. Richardson, clerk of the circuit court of the United States in and for the district of Idaho, do hereby certify that the foregoing transcript of pages numbered from 1 to 219, inclusive, are a full, true, and correct copy of the pleadings and proceedings in the above-entitled cause, and that the same together constitute the return to the annexed writ of error.

136 Witness my hand and the seal of said circuit court, affixed at Boisé City, Idaho, this 27th day of May, 1892.

[SEAL.] A. L. RICHARDSON, *Clerk.*

(Endorsed:) Number. 56. U. S. circuit court of appeals for the ninth circuit. Transcript of record on writ of error. Filed June 8, 1892. F. D. Monckton, clerk.

137 In the United States Circuit Court of Appeals for the Ninth Circuit.

EDWIN D. CARTER, Plaintiff in Error,
vs.
CHARLES RUDDY *et al.*
} No. 56.

Error to the United States circuit court for the district of Idaho.

John R. McBride & W. B. Heyburn, for plaintiff in error; Walter W. Jones, for defendants in error.

Before McKenna, circuit judge, and Hawley and Morrow, district judges.

138 By the court—MCKENNA, *J.*:

This is an action of ejectment. Plaintiff in error, who was also plaintiff in the court below, claims title by deed from one Walter Bourke, by his attorney-in-fact, W. R. Wallace.

Bourke, it is claimed, was a half-breed Sioux Indian, to whom was issued scrip under the act of July 17, 1854, entitled "An act to authorize the President of the United States to cause to be surveyed the tract of land in the Territory of Minnesota belonging to the half-breeds or mixed bloods of Dakota or Sioux nation of Indians, and for other purposes."

The act authorizes the President to exchange for a relinquishment of the interest the said Indians derived by the ninth article of the treaty of Prairie du Chien of 15th July, 1830 (vol. 7, U. S. Statutes, 330), for certificates or scrip for the same amount of land to which each Indian would be entitled in case of a division of the said reservation *pro rata* among the claimants, "which certificates or scrip may be located upon any of the lands within said reservation not now occupied by actual and *bona fide* settlers of the half-breeds or mixed bloods, or such other persons as have gone into said Territory by authority of law, or upon any other unoccupied lands subject to pre-emption or private sale, or upon any other unsurveyed lands not reserved by Government upon which they have respectively made improvements."

139 In other words, the exchange was of a general title for the opportunity to acquire titles in severalty of specific tracts of said reservation actually occupied by each Indian, or the right to acquire, acre for acre, other lands of the public domain not reserved upon which improvements might be made. The scrip was not transferable. A piece of scrip for 80 acres, issued under said act to said Walter Bourke, was located by his agent, Wallace, on land of which the block in controversy is a part. After this location had been made and a certificate issued by the United States land office at Cœur d'Alene city, the Commissioner of the General Land Office canceled it, having discovered that the scrip had been duplicated by an order of the Commissioner some years before, and the duplicate located on some lands in Dakota in 1880.

The plaintiff, however, contends that the Commissioner had no power to cancel the location, and that by it the title to the lands passed to his grantor. As to the power of the Commissioner we express no opinion, because, granting the location to be valid, we do not think it passed the legal title to plaintiff's grantor. The scrip and its location were not the legal title; they were but the means of obtaining it. The plaintiff, therefore, not having the legal title, could not recover except on prior possession, and the court did not err in instructing the jury that "they should disregard the location and deed as evidence of title, and only regard them as evidence explaining plaintiff's entry and possession and good faith."

It is well settled that one having only an equitable title cannot maintain ejectment in the Federal courts.

140 Langdon *vs.* Sherwood, 124 U. S., 74, 75; Foster *vs.* Mora, 94 U. S., 425; Johnston *vs.* Christian, 128 U. S., 382; 23 How., 235; 21 *id.*, 481.

The plaintiff alleged possession as well as title, describing the land sued for as the N. ½ of block 22, in the said town of Wallace, bounding it by certain streets, except two separate lots—pieces and parcels of land described on the plat of said town as lots 12 and 20, in said block 22, each of said lots being 25 feet wide and 100 feet long.

The property is, therefore, situate within the limits of said town, and the evidence is conflicting as to whether it was marked on the ground into lots, streets, and alleys at the time of plaintiff's purchase. His deed describes it as block 22, in said town of Wallace, consisting of 24 town lots bounded by certain streets. He claims, however, that he took and held it as one tract. The allegation of possession was denied by the defendants; therefore, what possession he took and held and what possession he had at the time of the entry of defendants were submitted to the jury and they found against him. Their verdict is conclusive, unless there was error in giving or refusing instructions or in the admission or rejection of testimony.

The plaintiff's counsel urged as error the refusal of the court to give the following instructions: "The plaintiff has introduced evidence showing that prior to the entry of defendants upon the north half of block 22 the plaintiff had erected two houses on the

141 said north half of said block, and at the time of the entry of defendants the plaintiff was in the actual possession of at least one of these houses by his tenant, and such possession is the actual possession of all the said north half of said block 22, and your verdict must be for the plaintiff. * * *

"The jury are instructed that if they believe that plaintiff had erected two houses on the north half of block 22 prior to the entry of the defendants and at the time of such entry by defendants was in actual occupancy of either of said houses by himself or his tenants, then the plaintiff is entitled to recover."

But the court after stating the contention of the parties as to pos-

session and as to the unity of the tract or its separation into lots instructed the jury as follows:

* * * "It is the law that where a party holds a tract of land as a separate and distinct tract and as one tract under a claim of title, as the boundaries of the tract are so designated, described, and marked that they may be known, his possession, either by himself or tenants, of a part of the tract operates as possession of all.

"In this case — you find that this half block was held by plaintiff as one tract or parcel of land, and that it was so marked out or designated in any way that defendants could know its location, and plaintiff had possession of any part of it, such possession extended to and gave him possession of the entire tract, but if, on the contrary, it was cut up into separate and distinct lots and so
142 marked upon the ground and treated as distinct tracts, then he must show the possession of all thereof." * * *

It was not error, therefore, to refuse the instructions requested. It may be observed that plaintiff alleged that the lots which he claims to have been in possession of tenants were "two separate lots, pieces, and parcels of land" from the land sued for. Can their possession, therefore, be the possession of land from which they were "separate"?

We do not think it is necessary to review each assignment of error separately. The 3rd to the 10th, both inclusive, and 16th, 17th, and 18th were based on the effect of the location as title and are decided with it.

In view of the instructions of the court as a whole, we do not think the court erred in refusing or in giving instructions. Those given fairly stated the law suitably to phases of the testimony and the contention of the parties, and there was no error prejudicial to plaintiff in the admission or rejection of testimony.

Judgment is therefore affirmed.

(Endorsed:) No. 56. U. S. circuit court of appeals for the ninth circuit. Carter *vs.* Ruddy. Opinion. Filed May 8th, 1893. F. D. Monckton, clerk.

143 United States Circuit Court of Appeals for the Ninth Circuit.

EDWIN D. CARTER, Plaintiff in Error, *vs.* CHARLES RUDDY, CHARLES ROBBINS, MICHAEL McMURRAY, Frederick A. Stevens, M. J. Donnelly, C. M. Patterson, John Doe, and Richard Roe.		No. 56. October Term, 1892.

In error to the circuit court of the United States for the district of Idaho.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Idaho, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed, with costs, and the cause is remanded to said circuit court for such further proceedings as may be necessary in accordance with the opinion of this court.

(Endorsed:) No. 56. United States circuit court of appeals for the ninth circuit. October term, 1892. Carter *v.* Ruddy *et al.* Judgment. Filed May 8, 1893. F. D. Monckton, clerk.

144 In the United States Circuit Court of Appeals *of* the Ninth Judicial Circuit.

EDWIN D. CARTER, Plaintiff in Error, *vs.* CHARLES RUDDY, CHARLES ROBBINS, MICHAEL McMURRAY, FREDERICK A. STEVENS, M. J. DONNELLY, C. M. PATTERSON, JOHN DOE, and RICHARD ROE, Defendants in Error.	Petition for Writ of Error.

To the Honorable Stephen J. Field, of the *United States* Supreme Court of the United States:

The plaintiff in error herein, Edwin D. Carter, comes and, conceiving himself aggrieved by the judgment and decision of the United States circuit court of appeals of the ninth judicial circuit, entered therein on the — day of ——, 1893, in the above-entitled action, doth pray for a writ of error from said decision and judgment of said United States circuit court of appeals for said ninth judicial circuit, and that a writ of error may be allowed to review the errors assigned herein, a copy of which assignment of errors is hereto annexed and made a part hereof, and that a transcript of the record and proceedings in said cause upon which said
145 judgment was rendered, duly authenticated, may be sent to the United States Supreme Court, at Washington, as provided by law.

JNO. R. McBRIDE,
ALBERT ALLEN,
W. B. HEYBURN,
Att'ys for Pl'ff in Error.

Assignment of Errors.

And the said plaintiff in error comes now, by his attorneys, as aforesaid, and upon the records and proceedings in said cause—see record, with attached Exhibit "A"—assigns the following errors:

That the said circuit court of appeals erred in its judgment affirming the decision and judgment of the circuit court of the district of Idaho, and because it did not reverse the said judgment, and for the following, among other reasons:

The circuit court, whose judgment is affirmed by the judgment of this court, erred as follows:

1. In rejecting the paper marked "Exhibit J" of plaintiff, being the notice addressed by the plaintiff, E. D. Carter, by his authorized agent, G. I. Bell, on the 27th day of February, 1889, to the defendants Charles Ruddy and M. Murray, which notice set forth the claim of the plaintiff to the property in dispute, and that he claimed it by right of possession and by occupation and improvement.

2nd. The court erred in rejecting the testimony of the said Bell as to posting notice in the month of February, 1889, on the
146 block of ground which this action is brought to recover, in which notice the plaintiff offered to prove that the said Carter claimed the ground in controversy, and notified parties of his claim thereto.

3rd. The court erred in permitting the defendants to introduce and read in testimony Exhibit No. 1 in the record, being the petition of the plaintiff for the transfer of this case to the circuit court of the United States and the reason therefor.

4th. The court erred in admitting Defendants' Exhibit No. 2, being the decision of the Commissioner of the General Land Office canceling the entry of Walter Bourke, being the Sioux half-breed scrip covering the land in controversy, the same being incompetent, immaterial, and irrelevant.

6th. The court erred in admitting in evidence the notice of R. E. McFarland, register of the land office, to W. R. Wallace, marked "Defendants' Exhibit No. 3."

7th. The court erred in admitting in evidence the power of attorney from Walter Bourke to Mr. Wells, marked "Defendants' Exhibit 4," by which said Wells is alleged to have made certain entires for other lands than those now in controversy.

8th. The court erred in admitting in evidence copies of the original and duplicate scrip marked "Defendants' Exhibit No. 5" in record; and also erred in refusing to strike out the same for the reason assigned in the record. It was incompetent, immaterial, and irrelevant in this action.

9th. The court erred in admitting in evidence the paper marked "Defendants' Exhibit No. 6," being copy of the patent issued
147 to Walter Bourke, founded on location made with Sioux half-breed scrip No. 430 C, at Fargo, Dakota Territory, R. and R., and the patent following the same.

10th. The court erred in permitting to be received in evidence those certain papers connected with duplicate of like papers, Sioux half-breed scrip No. 430, letter C, for 80 acres of land, and marked as "Defendants' Exhibit No. 7" in this record.

11th. The court erred in admitting in evidence the two maps showing the line of the railroad, the Northern Pacific railroad, it not appearing that the lands in controversy were railroad lands, and marked "Exhibit- 8 and 9" in the record.

12th. The court erred in admitting in evidence articles of incorporation of the town of Wallace, marked "Exhibit No. 10," and read in evidence to the jury.

13th. The court erred in admitting the map marked "Defendants' Exhibit No. 13," said map having been made long after the pur-

chase by plaintiff of the property in dispute and there being no evidence that he had any knowledge of its existence when purchased with reference to it at the time it was made.

14th. The court erred in admitting in evidence the notice signed by Ruddy, marked "Exhibit 13" and dated the 19th of February, 1889, claiming lots 2 and 3, in block 22, Shoshone county, Idaho, the same being immaterial, irrelevant, and conferring no right upon the plaintiff.

15th. The court erred in admitting in evidence "Defend-
148 ants' Exhibit 14," being notice of Murray to lots 6 and 8, in block 22, the same being incompetent, immaterial, and irrelevant.

16th. The court erred in its charge to the jury, which is found in words as follows:

"But I now instruct you that in an action like this in the United States courts such certificate issued by a land office of an entry of land cannot be received as any evidence of legal title, and the deed referred to, being based upon such entry, cannot be considered as evidence of a legal title or of a title in fee, and as evidence of such title you will entirely disregard them, and that the only consideration you may give to either said certificate or entry or said deed is as evidence to explain plaintiff's original entry upon the premises, to explain his claim to the possession thereof, and to show his good faith in the claim he asserts."

The effect of said charge being to entirely destroy all right of the plaintiff occurring out of the location of the scrip, the certificate of entry from the United States authorized thereunder, and his warranty deed under which he took possession of the land, and was therefore erroneous.

17th. The court erred in that part of its charge to the jury which is in following words:

"The defendants do not show or claim any title in fee to the premises," and before the words "it follows said part so excepted to," and the plaintiff having failed to show any.

Because the evidence shows that the plaintiff entered under
149 a warranty deed based upon the regular certificate from the Government of the United States and had *prima facie* a title in form, and his possession was based thereon.

18th. The court erred in that portion of the charge which is in the following words:

"It appearing, therefore, that the title to the premises was at the time referred to in this action and appears still to be in the Government of the United States."

Because it appeared from the testimony that the land had been purchased under the Sioux half-breed scrip, and that the title had been conveyed by a warranty deed from the grantee of the Government to the plaintiff in this action.

19th. The court erred in the following portion of its charge:

"But if, on the contrary, it was cut up into separate and distinct lots and so marked upon the ground and was held and treated as distinct tracts, then he must show the possession of all thereof."

Because the testimony does not show that this state of facts existed, and it does appear from the testimony that at the time of Carter's purchase it had not been cut up into separate and distinct lots, and was not so marked upon the ground, and was not held and treated as separate and distinct tracts, but was held by Carter as a single parcel of ground.

20th. The court erred in that portion of its charge which is in words as follows:

150 "It is a part of the policy of the Government to require as a condition to the alienation of its lots that they shall be improved and occupied for some beneficial purpose, and while it does not declare the use to which they shall be devoted, it does not design that citizens shall hold its land by simply possessory title without improvement or in an uncultivated state for speculation, but where such lands are held the holder must show by his acts it is for some useful purpose and with a view of developing and improving it; if it is for a mining claim he must work it; if a pre-emption claim he must improve it; if a timber claim he must plant it, and if a desert entry he must water it, and in the case of any kind of property the Government requires that such reasonable improvements shall be made as will fit it for the use to which it was to be adapted and show the good faith of the claimant, but it does not require a hardship, or that such improvements shall be of such a character or made in such time as to make his possession onerous or burdensome."

Said instructions being misleading, calculated to prejudice the jury, and being erroneous as matter of law, and having no application to the circumstances of this case.

21st. The court erred in that portion of its charge which is in words as follows:

"I will ask you now in taking the case that you will disregard anything but the real rights of these parties. Much has been said here about the good or bad faith with which these parties have entered and the possession and standing of the plaintiff, and

151 perhaps some things have been said that might tend to prejudice you. I want to say to you that you are in the position of a court; it is your duty to disregard everything that tends to prejudice your judgment in the least, and to listen only or take only under your consideration the law applicable to the case and the evidence to determine between these two parties just as you deem the law, according to the evidence that has been placed before you."

Said instruction being misleading, as leaving the jury to infer that the right of the plaintiff was determined upon some other rule than the prior possession and the ownership of the property under the conveyance which has been made to him.

22nd. The court erred in refusing to give to the jury the 1st instruction asked for by plaintiff, which was in words as follows:

"The plaintiff has introduced evidence showing that prior to the entry of defendants upon the north half of block 22, the plaintiff had erected two houses on the said north half of said block, and at the time of the entry of the defendants the plaintiff was in the actual possession of at least one of these houses by his tenant, and such

possession is the actual possession of all the said north half of said block 22, and your verdict must be for the plaintiff."

23rd. The court erred in refusing to give the 2nd instruction asked for by plaintiff, which was in words as follows:

"The jury are instructed that if they believe that plaintiff had erected two houses on the north half of block 22 prior to the
152 entry of the defendants, and at the time of such entry by defendants was in the actual occupancy of either of said houses by himself or his tenants, then the plaintiff is entitled to recover."

24th. The court erred in refusing to give to the jury the 3rd instruction asked for — plaintiff, which was in words as follows:

"In determining the question of whether the plaintiff had possession of the premises in controversy at the time of the entry of the defendants, I instruct you that it is not necessary that the land be enclosed with a fence, or that the plaintiff actually reside upon it, or that he remain constantly upon the land, or even that he keep an agent or tenant constantly upon the land, and if you find from the evidence that the plaintiff entered upon the north half of block 22, in the town of Wallace, which includes the premises in controversy, claiming the whole thereof, and that the boundaries thereof were distinctly marked upon the ground, and were well known, and that he exercised acts of ownership over the same by clearing off the timber and by the construction of two houses thereon and by building sidewalks, and that the same were done for the purpose of improving the same, and that he paid the taxes thereon, and that these acts of plaintiff were open and notorious, then I instruct you that said acts would constitute possession by the plaintiff of the whole of the north half of the block."

"And I further instruct you that such possession of the plaintiff would give him (plaintiff) title, upon which he may recover against the defendants."

153 25th. The court erred in refusing to give to the jury the 4th instruction asked for — plaintiff, which was in words as follows:

"If the jury find from the evidence that the plaintiff was in the possession of the premises in controversy within the meaning of the term as I have defined them, at the time prior to the entry of the defendants, then I instruct you that such possession is presumed to continue until entry thereon by the defendants, and the burden is upon the defendants to show that plaintiff had abandoned his possession to the ground in controversy at the time they entered, and in determining the question of abandonment you may consider the payment of taxes on the land by plaintiff as well as all his other acts relating to the premises."

26th. The court erred in refusing to give to the jury the 5th instruction asked for by plaintiff, which was in words as follows:

"In determining the question of whether the plaintiff entered into possession of the whole north half of the block 22, the jury are to consider the deed given in evidence as well as the subsequent payment of the taxes upon the land by the plaintiff."

27th. The court erred in refusing to give to the jury the 6th instruction asked for by plaintiff, which was in words as follows:

"The jury are instructed that in determining the question
154 of whether the plaintiff was in possession of the premises in controversy at the time of the entry of the defendants, it is not necessary that the plaintiff should have been an inhabitant or actual resident of the town of Wallace, or that he actually resided upon the premises in controversy or any part thereof, or that the premises be enclosed with a fence, or that there should be a building upon any of the lots in controversy."

28th. The court erred in refusing to give to the jury the 7th instruction asked for by plaintiff, which was in words as follows:

"The jury are instructed that if the plaintiff entered upon the premises in controversy under a deed from Walter Bourke, introduced in evidence, claiming title to all of block 22, in good faith, under said deed, and erected buildings or made other improvements upon a portion of said block, and that the said premises were not in the adverse possession of any one at the time he so entered, and that under said claim of ownership under said deed he cleared the whole or a portion of said block, then I instruct you that his possession of a part of the premises described in said deed would be a possession of the whole block, including the ground in controversy; and if you find that the plaintiff did not subsequently abandon said premises, but still continued to claim the same, and exercised acts of dominion and control over the same, claiming under said deed, then I instruct
you that the defendant could not obtain any right in the
155 premises by an entry thereon; that such possession of the plaintiff would give him the title to the premises as against the defendant."

29th. The court erred in its refusal to give to the jury the 8th instruction asked for by plaintiff, which was in words as follows:

"Possession may be evidenced in several ways: First. By an actual residence upon the property, or by an inclosure or by making improvements thereon, or by cultivating the same, or by any other acts that are open and notorious that shows that he exercises a dominion and control over the same; and that among such acts may be enumerated the cutting of timber and clearing of land, and the payment of taxes thereon."

30th. The court erred in refusing to give to the jury the 9th instruction asked for by plaintiff, which was in words as follows:

"If you believe from the evidence that the plaintiff entered upon and took possession of block 22, in the town of Wallace, under and by virtue of a deed from Walter Bourke, introduced in evidence; that he immediately went upon, occupied, and improved and continued to occupy the said block of land and asserted his claim and possession to the whole of said block under said deed, and no other persons *was* in adverse possession of any portion thereof up to the time when the defendants entered thereon and never abandoned the same, and that the premises in controversy in this suit are within the boundaries of said block 22—you will find for the plaintiff."

31st. The court erred in refusing to give the 10th instruction asked for by plaintiff, which was in words as follows:

156 "The jury are instructed that a fence, building, or other improvement is not essential to plaintiff's right to recover, if plaintiff shows acts of ownership under claim of right visible and notorious. Such acts are sufficient to authorize the jury to find such possession."

32nd. The court erred in its refusal to give the 11th instruction asked for by the plaintiff, which was in words as follows:

"The jury are instructed that the uninterrupted payment of taxes on the land is powerful evidence of a claim of right to it."

33rd. The court erred in its refusal to give to the jury the 12th instruction asked for by the plaintiff, which was in the following words:

"The jury are instructed that neither actual occupation, cultivation, or residence are necessary to constitute actual possession."

34th. The court erred in its refusal to give the 13th instruction asked for by plaintiff, which was in the following words:

"Mere possession is a good title against a stranger having no title; a mere intruder cannot enter upon a person seized, eject him, and when sued question his title or set up any outstanding title in another. The prior peaceable possession of the plaintiff is enough to enable him to recover in ejectment against one having no title."

Wherefore we pray that said judgment be reversed.

157 JNO. R. McBRIDE,
ALBERT ALLEN, &
W. B. HEYBURN,
Att'ys for Plaintiff in Error.

(Endorsed:) No. 56. U. S. circuit court of appeals, ninth judicial circuit. Edwin D. Carter, pl'ff in error, *vs.* Charles Ruddy *et al.*, def'ts in error. Petition for writ of error and exhibits. Filed Nov. 10, 1893. F. D. Monckton, clerk.

158 In the Supreme Court of the United States.

EDWIN D. CARTER, Plaintiff in Error, *vs.* CHARLES RUDDY, CHARLES ROBBINS, MICHAEL McMURRAY, Frederick A. Stevens, M. J. Donnelly, C. M. Patterson, John Doe, and Richard Roe, Defendants in Error.	Bond on Writ of Error.

Know all men by these presents that we, Edwin D. Carter, as principal, Frank C. Loring, and H. W. Augustine, residents and householders of the State of Washington, in the ninth judicial circuit of the United States, are held and firmly bound, jointly and severally, by these presents unto Charles Ruddy, Charles Robbins, Michael McMurray, Frederick A. Stevens, M. J. Donnelly, C. M. Patterson, John Doe, and Richard Roe, defendants, in the just and full sum of five hundred dollars ($500), lawful money of the United States,

to be paid to the said obligees, their executors, administrators, or assigns; — which payment, well and truly to be made, we hereby bind ourselves, our heirs, executors, and administrators, and each of us, firmly by these presents.

Sealed with our seals and dated this 3d day of October, in the year of our Lord 1893.

159 Whereas lately, in a suit then pending in the United States circuit court of appeals in and for the ninth judicial circuit, between the said Edwin D. Carter, as plaintiff in error, and the said Charles Ruddy, Charles Robbins, Michael McMurray, Frederick A. Stevens, M. J. Donnelly, C. M. Patterson, John Doe, and Richard Roe, defendants in error, a judgment was rendered by the said court against the said plaintiff on the — day of —— and in favor of the said defendants, and the said plaintiff in error having sued out his writ of error from the said judgment of the said circuit court of appeals for the ninth judicial circuit to the United States Supreme Court, praying for a reversal of the said judgment, and the same has been duly allowed, and a writ of error has been issued to the said defendants, admonishing them to be and appear at the city of Washington at a term of the Supreme Court of the United States to be held on the — day of October, 1893:

Now, the condition of this obligation is such that if the said plaintiff in error shall prosecute his writ of error to effect an- answer all damages and costs if he shall fail to make his plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

EDWIN D. CARTER. [SEAL.]
FRANK C. LORING. [SEAL.]
H. W. AUGUSTINE. [SEAL.]

Sealed and delivered in presence of—
JNO. R. McBRIDE.

160 STATE OF ——, } ss:
County of ——, }

F. C. Loring and H. W. Augustine, being first duly sworn according to law, deposes each as follows:

I am the person who signed the foregoing bond, and I state that I am worth the sum specified therein as the penalty thereof over and above all my just debts and liabilities, exclusive of property which is exempt from execution, and that I am a resident and householder of said State and county.

FRANK C. LORING.
H. W. AUGUSTINE.

Subscribed and sworn to before me this 3d day of October, 1893.
[SEAL.] S. C. HYDE,
Notary Public in and for the State of Washington,
Residing at Spokane, Washington.

Approved by—
STEPHEN J. FIELD,
Associate Justice Sup. Court U. S.

(Endorsed:) No. 56. U. S. circuit court of appeals, 9th circuit. Bond on writ of error. E. D. Carter, pl'ff in error, *v.* Chas. Ruddy *et al.* Filed Nov. 10, 1893. F. D. Monckton, clerk.

161 United States Circuit Court of Appeals for the Ninth Circuit.

EDWIN D. CARTER, Plaintiff in Error,
vs.
CHARLES RUDDY *et al.* } No. 56.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing one hundred and sixty pages, numbered from 1 to 160, inclusive, to be a full, true, and correct copy of the record and of the proceedings in the above-entitled cause, and that the same together constitute the return to the annexed writ of error.

I further certify that no mandate has issued out of our said United States circuit court of appeals to the United States circuit court for the district of Idaho in said cause.

Attest my hand and the seal of said United States circuit court of appeals for the ninth circuit, at San Francisco, this 22nd day of November, A. D. 1893.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

162 Original.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the ninth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals, before you or some of you, between Edwin D. Carter, plaintiff in error, and Charles Ruddy, Charles Robbins, Michael McMurray, Frederick A. Stevens, M. J. Donnelly, C. M. Patterson, John Doe, and Richard Roe, defendants in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 60 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error

what of right and according to the laws and customs of the United States should be done.

Seal of the Supreme Court of the United States.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 24th day of October, in the year of our Lord one thousand eight hundred and ninety-three.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
STEPHEN J. FIELD,
Associate Justice of the Supreme Court of the United States.

163 [Endorsed:] D. No. 56. U. S. circuit court of appeals, 9th circuit. Carter *v.* Ruddy *et al.* Writ of error. Filed Nov. 10, 1893. F. D. Monckton, clerk.

The Answer of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court to the Supreme Court of the United States, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within we are commanded.

By the court:

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

I have received a true copy of the within writ from Mr. John R. McBride at Wallace, Shoshone county, State of Idaho, this first day of November, in the year of our Lord one thousand eight hundred and ninety-three.

WALTER A. JONES,
Attorney for Def'ts in Error.

164 Original.

UNITED STATES OF AMERICA, *ss:*

To Charles Ruddy, Charles Robbins, Michael McMurray, Frederick A. Stevens, M. J. Donnelly, C. M. Patterson, John Doe, and Richard Roe, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the ninth circuit, wherein Edwin D. Carter is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of

error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Stephen J. Field, associate justice of the Supreme Court of the United States, this 24th day of October, in the year of our Lord one thousand eight hundred and ninety-three.

STEPHEN J. FIELD,
Associate Justice Sup. Court U. S.

165 [Endorsed:] D. No. 56. U. S. circuit court *court* of appeals, 9th circ-t. Carter *v.* Ruddy *et al.* Citation. Filed Nov. 10, 1893. F. D. Monckton, clerk.

I have received a true copy of the within citation from Mr. John R. McBride, at Wallace, Shoshone county, State of Idaho, this first day of November, in the year of our Lord one thousand eight hundred and ninety-three.

WALTER A. JONES,
Attorney for Def'ts in Error.

166 At a stated term, to wit, the October term, A. D. 1893, of the United States circuit court of appeals for the ninth circuit, held at the court-room, in the city and county of San Francisco, on Tuesday, the twenty-first day of November, in the year of our Lord one thousand eight hundred and ninety-three.

Present: The Honorable Joseph McKenna, circuit judge; Honorable William B. Gilbert, circuit judge; Honorable C. H. Hanford, district judge.

EDWIN D. CARTER, Plaintiff in Error,
vs.
CHARLES RUDDY *et al.* } No. 56.

It appearing to the court that the above-entitled cause is about to be taken to the Supreme Court of the United States pursuant to a writ of error duly allowed—

It is ordered that the clerk of this court forthwith transmit to the clerk of said Supreme Court the following maps or tracings, the same being exhibits in said cause, viz., Plaintiff's Exhibit "D," Defendants' Exhibit "12," Defendants' Exhibit "14."

It is further ordered that upon the final disposition of said cause in the said Supreme Court that said exhibits be returned to the clerk of this court for preservation as a part of the records of this court.

167 [Endorsed:] No. 56. U. S. circuit court of appeals for the ninth circuit. Edwin D. Carter, pl'ff in error, *v.* Charles Ruddy *et al.* Certified copy of order. Filed —— —, 189–. ——, clerk.

I hereby certify that the foregoing is a full, true, and correct copy of an original order made and entered in the within-entitled cause.

Attest my hand and the seal of said circuit court of appeals this 21st day of Nov'r, A. D. 1893.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

(Here follow maps marked pp. 168, 169, & 170.)

Endorsed on cover: Case No. 15,850. U. S. circuit court of appeals, ninth circuit. Term No., 250. Edwin D. Carter, plaintiff in error, *vs.* Charles Ruddy, Charles Robbins, Michael McMurray, Frederick A. Stevens, M. J. Donnelly, C. M. Patterson, John Doe, and Richard Roe. Filed March 29th, 1895.

166-493

Supreme Court, U. S.
FILED.
FEB 15 1897
JAMES H. McKENNEY,
CLERK.

166-493

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 250.

EDWIN D. CARTER, PLAINTIFF IN ERROR,

vs.

CHARLES RUDDY, CHARLES ROBBINS, MICHAEL McMURRAY, FREDERICK A. STEVENS, M. J. DONNELLY, C. M. PATTERSON, JOHN DOE AND RICHARD ROE.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF PLAINTIFF IN ERROR.

W. B. HEYBURN,
ALBERT ALLEN,
Attorneys for Plaintiff in Error.

J. R. LAMBLY, PRINTER, SPOKANE, WASH.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 250.

EDWIN D. CARTER, PLAINTIFF IN ERROR,

vs.

CHARLES RUDDY, CHARLES ROBBINS, MICHAEL McMURRAY, FREDERICK A. STEVENS, M. J. DONNELLY, C. M. PATTERSON, JOHN DOE AND RICHARD ROE.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF PLAINTIFF IN ERROR.

This was an action brought by plaintiff in error against the defendants in error in the District Court of the First Judicial District of the Territory of Idaho, in and for Shoshone County, before the admission of Idaho as a State. The action was at issue and pending in the said District Court at the time of the admission of the said State, which was on the 3d of July, 1890. On the 14th of July, 1890, the plaintiff filed his peti-

tion for a removal of the cause to the United States Circuit Court for the District of Idaho, together with a bond as provided by law, and the case was thereupon removed to said United States Circuit Court.

The plaintiff alleges in his complaint, that on the 19th day of February, 1889, he owned and was seized and possessed of, and entitled to the possession of, that certain tract or parcel of land situated in Shoshone County, Territory of Idaho, known as the north half of Block 22, of the town of Wallace. That while he was such owner and was seized and possessed of and entitled to the possession of said premises, the said defendants on the 19th day of February, 1889, without right or title, entered into the possession of the said premises and ousted and ejected the plaintiff therefrom, except as to two small parcels thereof, and that they now unlawfully withhold the possession thereof from the plaintiff to his damage in the sum of ten thousand dollars, and prays judgment for the possession of the premises and for damages in the sum of ten thousand dollars and for rents and profits.

To this, the defendants each interposed a separate answer denying the plaintiff's ownership or possession of the entire premises sued for, and denying that on the 19th day of February, 1889, or at any other time, while plaintiff was the owner of and seized and possessed of or entitled to the possession of the said north half of Block 22, they entered without any right

or title into the possession of said premises or any part thereof and ousted or ejected the plaintiff therefrom, or that they unlawfully withhold the possession thereof, or any part thereof, from the plaintiff to his damage in any sum. And each of said defendants, further answering, allege that he is a citizen of the United States and a resident of the Territory of Idaho. That on the 25th day of February, 1889, and for a long time prior thereto, the lots which they severally claim, a part of the demanded premises, were public lands of the United States, entirely vacant and unoccupied, and were not owned or held or occupied by any person or persons for any purpose whatever and that while the said lots were so vacant and unoccupied on the 25th day of February, 1889, they entered upon and located and appropriated said lots as residence or town lots, and that after going thereon, they placed a written notice of location on each of said lots describing said lots so located and appropriated, giving the name of the locator, and the date of the location, and enclosed the same by actual enclosure, consisting of a good substantial board fence, and that they complied in all respects with the laws, customs, rules and regulations of the said town of Wallace, and of the inhabitants thereof, and caused said notice of location to be filed and recorded in the proper books of record in the office of the recorder of said town of Wallace and thereby became and were the owners (except

as against the paramount title of the United States) and the rightful possessors of said lots and pieces of land, and that they have remained in continuous, quiet and peaceable possession of said lots since said date of location.

Each of the said defendants then prayed judgment that his title and right of possession to said lots, respectively, be quieted and confirmed.

Upon these issues the case proceeded to trial before the Court sitting with a jury; and the plaintiff requested an instruction for a verdict as follows:

"The plaintiff has introduced evidence showing that prior to the entry of defendants upon the north half of Block 22, the plaintiff had erected two houses on the said north half of said block, and at the time of the entry of the defendants the plaintiff was in the actual possession of at least one of these houses by his tenant, and such possession is the actual possession of all the said north half of said Block 22, and your verdict must be for the plaintiff."

This instruction the Court refused to give, to which plaintiff excepted.

And on December 11th, 1891, the jury rendered a verdict for the defendants. (Trans., page 17.)

After the rendition of said verdict, and before the entry of judgment, the plaintiff moved the Court that judgment be entered in his favor and against the defendants notwithstanding the verdict of the jury rendered herein, and for grounds alleged:

I.

That the undisputed facts in the case show that the plaintiff entered and was in possession under and by virtue of a warranty deed from one Walter Bourke, and continued to have such possession under said deed up to the time of the entry of defendants, and that said deed described and conveyed the premises in controversy, and the plaintiff was shown to be in the actual possession, by his tenant, at the time of the entry of the defendants.

II.

That the question of possession where a party is shown to have been in possession under warranty deed, is a question of law for the Court and not a question of fact for the jury in this case.

III.

That the plaintiff being shown to be in possession under a warranty deed of a part of the premises described in said deed, at the time of the entry of this defendant, and this fact not being denied, the Court should not leave the question of possession to the jury, the extent of such possession being a matter of law for the Court. (Trans., pages 29-30.)

Which motion the Court denied. (Trans., page 31.)

Motion for a new trial was made and overruled. (Trans., page 32.)

The plaintiff settled a bill of exceptions at the time of the trial (Trans., page 33), whereby it appears that the plaintiff is a citizen of the United States; that he first became acquainted with the premises in controversy in July, 1886, at which time one W. R. Wallace had possession of 80 acres of land which included the demanded premises. That at that time there were two or three log houses on the 80-acre tract and a fence running partly around it. That Mr. Wallace claimed to be representing Walter Bourke, a half-breed Sioux Indian, and that he had, as the agent of said Bourke, entered the ground with a piece of Sioux half-breed scrip; that the tract of ground was marked by corner stakes marking the boundaries of the 80 acres, which was generally known as the "Black Forest;" that it was densely covered with cedar timber. That there was no store or anything more than three or four log buildings there at the time; that Wallace proposed to plaintiff that if he would bring in a saw-mill and a stock of goods he would sell him Block 22 for $600, and that he would sell the plaintiff the timber on the entire 80 acres for one dollar a thousand, the logs to be scaled at the mill as delivered, and that plaintiff was to pay him for the timber aside from purchasing the block of land. That at that time Mr. Wallace showed him what they called the land office receipt, which is paper marked "Exhibit A" (Trans., page 34). That this paper

was shown to plaintiff in June, 1886, by Mr. Wallace as relating to the title to this 80-acre tract.

That plaintiff told Wallace that if he concluded to accept the proposition he would be there or have his foreman, Mr. Howes, there in 30 days with a mill and stock of goods. That plaintiff then went direct to Portland, Oregon, and bought a saw-mill and stock of goods, and sent them in charge of Mr. Howes, who had been in his employ more or less for ten years. That when plaintiff was there in June, 1886, he was over the ground, Block 22, and saw the corner stakes of said block, but didn't see anything to mark any lots in the interior of the block.

The plaintiff next returned to where the town of Wallace now is, in October, 1886, and found Mr. Wallace and plaintiff's agent, Mr. Howes, there with the saw-mill up and running, cutting lumber. That Mr. Howes had then put up a small store, put in a stock of goods and started to build a hotel. That upon plaintiff's return at this time, Mr. Wallace, as attorney in fact for Walter Bourke, gave him a warranty deed for Block 22, and exhibited to the plaintiff the power of attorney, marked "Exhibit B" (Trans., page 37), from Walter Bourke and wife to the said Wallace, authorizing the making of the deed, and delivered to the plaintiff said warranty deed, "Exhibit C" (Trans., page 39). The plaintiff then testified in detail as to the character of the work per-

formed by him, and on his account, in clearing up said Block 22 (Trans., pages 41-42-43), and that he built a side-walk around the entire west side, and the entire north side of said block except fifty feet, and built pieces of side-walks on the south side, 50 feet on the south line to the southwest corner, and 25 feet more in front of the building he had built on said block. That he personally superintended the construction of the side-walk on the west side of the block; that it was four feet wide, built from two-inch plank, laid on 4×4 or 4×6 stringers, which were set on posts, where the ground was uneven, to level the side-walk. That the side-walk on the north side was six feet wide, built of two-inch plank in the same manner. That he had the logs and timber on the ground rolled together and burned up for the purpose of clearing this block with a view to building on it. That the side-walk was built for the purpose of improving the block as well as for the convenience of travel. That the improvements of clearing the block and the side-walk were made under his claim of ownership to the block in controversy, because he had bought it and paid for it and supposed that he owned it. That he purchased a water right in the year 1887, and laid a main and brought water to the corner opposite Block 22. That he expended a large amount of money in connection with bringing water on this block. (Trans., page 42.) That prior to the entry

of the defendants the plaintiff had built two buildings on the north half of Block 22; one costing $890, and the other $510. (Trans., pages 42-43.) That he paid both county and city taxes assessed against this property for the years 1887-1888, receipts for which appear in the Trans., pages 43-44.

Plaintiff then testified that he had never abandoned, nor ceased to claim, the entire north half of Block 22, but had continued to add improvements up to the time that defendants took forcible possession of it. That he has at all times owned the buildings which he put thereon since he erected them; that at least $200 worth of clearing was done on the demanded premises independent of cutting timber for the sawmill. That the value of the premises was not less than $10,000. That he had a tenant in the two-story house on the demanded premises on the 19th day of February, 1889, who had been there about eight months, and remained there until the 25th of March, 1889. The plaintiff also testified as to other acts of ownership and possession of the said premises.

The facts with reference to the plaintiff's purchase, ownership and expenditure upon the demanded premises were fully corroborated by the testimony of Henry E. Howes. (Trans., page 53.) A photograph "Exhibit H" (Trans., page 55), was offered showing the condition of the block prior to the entry of defendants.

E. H. Moffitt testified (Trans., page 64), corroborating plaintiff as to the building upon the demanded premises.

D. C. McKissick testified (Trans., page 67) as to the exercise of the rights of ownership over the premises by the plaintiff. Also Geo. McLaughlin (Trans., page 69), and Lucy A. Wallace (Trans., page 70).

This latter witness testified also as to the entry of the defendants; that she lived opposite Block 22; that it had been cleared up by Mr. Carter and his men nearly as well as it could be; and also as to the construction of the buildings by Mr. Carter, on the demanded premises prior to the entry of the defendants. That she knew that it was taken possession of by the defendants, some of whom advised her to participate in the jumping of the ground. That defendants took possession in the night time. (Trans., page 71.)

W. C. Human testified (Trans., pape 73), that he was County Commissioner in 1886, and had occasion to visit the town of Wallace between that and 1888 frequently, and knew the condition of Block 22. That in 1886 it was a dense forest; that in 1888 it was all cleared except the stumps; that in 1887 he built right across on the corner from Block 22, and was familiar with the premises.

George I. Bell testified to the building of side-walks and clearing of the lot. (Trans., page 74.)

Plaintiff then offered in evidence copies of the notices served upon the defendants at the time of their entry (Trans., page 76), and rested their case.

The defendants then offered in evidence, plaintiff's petition for removal, and the decision of the Commissioner of the general land office cancelling the entry of Walter Bourke made on the premises, and a letter of notification addressed to W. R. Wallace, attorney in fact for the plaintiff's grantor, dated February 3d, 1887 (Trans,, page 83), and a power of attorney from Walter Bourke to Mr. Wells (Trans., page 84). Also copies of original and duplicate scrip, the entries claimed to have been made thereunder, and proceedings connected therewith. (Trans., pages 85-104).

Defendants then offered in evidence the proceedings of the Board of County Commissioners with reference to the incorporation of the town of Wallace on May 2d, 1888. (Trans., page 104.) The testimony of Geo. R. Trask was then introduced for the purpose of showing that he had surveyed the town of Wallace at the request of Col. Wallace in May, 1886. Defendants then introduced the testimony of T. M. Dowd (Trans., page 108), P. J. Holohan (Trans., page 108), J. M. Harris (Trans., page 110), Charles Ruddy (Trans., page 111), M. J. Donnelly (Trans., page 114), C. A. Baldwin (Trans., page 115), Thos. F. Hanley (Trans., page 116), Pat Ryan (Trans., page 117), W. D. McFadden (Trans., page 117), for the purpose

of disproving Mr. Carter's testimony with reference to the improvements upon Block 22.

The map contained in the Transcript, marked plaintiff's Exhibit "D," correctly represents Block 22 and the side-walks and buildings thereon, at the time when the defendants took possession thereof in the night time.

Assignment of Errors.

The plaintiff assigns as error the following:

I.

The Court erred in admitting defendant's Exhibit No. 2, and defendant's Exhibit No. 3, relating to the proceedings of the general land office and the local land office in connection with the cancellation of the entry made of the premises in controversy by plaintiff's grantor, Walter Bourke.

II.

The Court erred in admitting defendant's Exhibits, Nos. 4, 5, 6 and 7, relating to the issuance of duplicate scrip to Walter Bourke, and the making of certain entries thereon, in the Territory of Dakota.

III.

The Court erred in admitting in evidence the articles of incorporation of the town of Wallace, marked Exhibit No. 10.

IV.

The Court erred in admitting in evidence map marked defendant's Exhibit No. 13.

V.

The Court erred in admitting in evidence the notice signed by the defendant Ruddy, marked Exhibit 13, and the defendant's Exhibit No. 14, being the notice of location of lots by the defendant Murray.

VI.

The Court erred in charging the jury.:

"But if on the contrary it was cut up into separate and distinct lots, and so marked upon the ground and was held and treated as distinct tracts, then he must show the possession of all thereof."

VII.

The Court erred in refusing to instruct the jury, as requested by plaintiff, as follows:

"The plaintiff has introduced evidence showing that prior to the entry of defendants upon the north half of Block 22 the plaintiff had erected two houses on the said north half of said block, and at the time of the entry of defendants the plaintiff was in the actual possession of at least one of these houses by his tenant, and such possession is the actual possession of all of the said north half of said Block 22 and your verdict must be for the plaintiff."

VIII.

The Court erred in refusing to instruct the jury, as requested by plaintiff, as follows:

"The jury are instructed that if they believe plaintiff had erected two houses on the north half of Block 22 prior to the entry of the defendants, and at the time of such entry by the defendants was in the actual occupancy of either of said houses, by himself or his tenants, then the plaintiff is entitled to recover."

IX.

The Court erred in refusing to instruct the jury, as requested by plaintiff, as follows:

"In determining the question of whether the plaintiff had possession of the premises in controversy, at the time of the entry of the defendants, I instruct you that it is not necessary that the land be enclosed with a fence, or that the plaintiff actually reside upon it, or that he remain constantly upon the land, or even that he keep an agent or tenant constantly upon the land, and if you find from the evidence that the plaintiff entered upon the north half of Block 22, in the town of Wallace, which includes the premises in controversy, claiming the whole thereof, and that the boundaries thereof were distinctly marked upon the ground, and were well known, and that he exercised acts of ownership over the same by clearing off the timber, and by the construction of two houses thereon, and by building side-walks, and that the same were done for the purpose of improving the same, and that he

paid the taxes thereon, and that these acts of the plaintiff were open and notorious, then I instruct you that said acts would constitute possession by the plaintiff of the whole of the north half of the block."

X.

The Court erred in refusing to instruct the jury, as requested by plaintiff, as follows:

"If the jury find from the evidence that the plaintiff was in the possession of the premises in controversy within the meaning of the term as I have defined them, at the time prior to the entry of the defendants, then I instruct you that such possession is presumed to continue until entry thereon by the defendants, and the burden is upon the defendants to show that the plaintiff had abandoned his possession to the ground in controversy at the time they entered, and in determining the question of abandonment you may consider the payment of taxes on the land by the plaintiff, as well as his other acts relating to the premises."

XI.

The Court erred in refusing to instruct the jury, at the request of the plaintiff, as follows:

"In determining the question of whether the plaintiff entered into possession of the whole of the north half of the Block 22, the jury are to consider the deed given in evidence as well as the subsequent payment of the taxes upon the land by the plaintiff."

XII.

The Court erred in refusing to instruct the jury, at the request of the plaintiff, as follows:

"The jury are instructed that in determining the question of whether the plaintiff was in possession of the premises in controversy at the time of the entry of the defendants it is not necessary that the plaintiff should have been an inhabitant or actual resident of the town of Wallace, or that he actually resided upon the premises in controversy or any part thereof or that the premises be enclosed by a fence, or that there should be a building upon any of the lots in controversy."

XIII.

The Court erred in refusing to instruct the jury, at the request of the plaintiff, as follows:

"The jury are instructed that if the plaintiff entered upon the premises in controversy under a deed from Walter Bourke, introduced in evidence, claiming title to all of Block 22, in good faith, under said deed, and erected buildings or made other improvements upon a portion of said block, and that the said premises were not in the adverse possession of any one at the time he so entered, and that under said claim of ownership under said deed he cleared the whole or a portion of said block, then I instruct you that his possession of a part of the premises described in said deed would be a possession of the whole block including the ground in controversy; and if you find that the plaintiff did not subsequently abandon said

premises, but still continued to claim the same, and exercised acts of dominion and control over the same, claiming under said deed, then I instruct you that the defendant could not obtain any right in the premises, by any entry thereon. That such possession of the plaintiff would give him title to the premises as against the defendant."

XIV.

The Court erred in refusing to instruct the jury, as requested by plaintiff, as follows:

"Possession may be evidenced in several ways. First, by an actual residence upon the property, or by an inclosure, or by making improvements thereon, or by cultivating the same, or by any other acts that are open and notorious, that shows that he exercises a dominion and control over the same; and that among such acts may be enumerated the cutting of timber and clearing of land, and the payment of taxes thereon."

XV.

The Court erred in refusing to instruct the jury, as requested by plaintiff, as follows:

"If you believe from the evidence that the plaintiff entered upon and took possession of Block 22, in the town of Wallace, under and by virtue of a deed from Walter Bourke, introduced in evidence; that he immediately went upon, occupied and improved and continued to occupy the said block of land and asserted his claim and possession to the whole of said block,

under said deed, and no other person was in adverse possession of any portion thereof up to the time when the defendants entered thereon, and never abandoned the same, and that the premises in controversy in this suit are within the boundaries of said Block 22—you will find for the plaintiff."

XVI.

The Court erred in refusing to instruct the jury, as requested by the plaintiff, as follows:

"The jury are instructed that a fence, building or other improvements is not essential to plaintiff's right to recover if plaintiff shows acts of ownership under claim of right, visible and notorious. Such acts are sufficient to authorize the jury to find such possession."

XVII

The Court erred in refusing to instruct the jury, as requested by the plaintiff, as follows:

"The jury are instructed that the uninterrupted payment of taxes on the land is a powerful evidence of a claim of right to it."

XVIII.

The Court erred in refusing to instruct the jury, as requested by the plaintiff, as follows:

"Mere possession is a good title against a stranger having no title, a mere intruder cannot enter upon a person seized, eject him, and when sued question his

title or set up any outstanding title in another. The prior peaceable possession of the plaintiff is enough to enable him to recover in ejectment against one having no title."

ARGUMENT.

We contended at the trial, and in the Circuit Court of Appeals, that it being established beyond any controversy, by documentary evidence, that the plaintiff entered into the possession of the demanded premises under warranty deed, made by Walter Bourke and wife to him, for Block 22 in the town of Wallace, prior to any action of the Land Department cancelling the entry of the land, and made substantial improvements thereon by the erection of two houses upon a part of said block, which said houses were being occupied by tenants of the plaintiff at the time of the entry of the defendants, and the undisputed testimony of the plaintiff's witnesses that the block was plainly marked upon the ground by posts planted at each corner, that the plaintiff was entitled to a peremptory instruction for a verdict for the premises described in the deed, and was furthermore entitled to a judgment, notwithstanding the verdict.

We assume this position on the grounds that the plaintiff entered under color of title by virtue of the deed from Walter Bourke and wife, and that his pos-

session under said deed was co-extensive with the premises described therein, and we base our position upon the doctrine laid down by the Supreme Court of the United States in the case of Lessees of Clark et al. *vs.* Courtney et al., 5th Peters, 319-354, wherein the Court says:

"Where a person enters on the land under deed or title his possession is construed to be co-extensive with his deed or title, and although the deed or title may turn out to be defective or void, yet the true owner will be deemed seized to the extent of the boundaries in said deed and title."

The same doctrine is stated in Green *vs.* Liter et al., 8th Cranch, 229.

In this case it is not claimed that any other person than the plaintiff claimed possession of the premises prior to the entry made by the defendants in the night time on the 19th of February, 1889, and no evidence was offered by the defendants, or on their behalf, tending to show that any claim was made to the premises prior to their entry, other than that made by plaintiff.

In the case of Wright *vs.* Mattison, 18 Howard (U. S.), page 56, "color of title" is defined "to be that which in appearance is title, but which in reality is no title." And in the same case the Court holds that "What is color of title *is a matter of law*, and when the facts exhibiting the title are shown the Court will determine whether they amount to color of title."

In the same case the Court holds that good faith in the party claiming under such "color of title" is a question of fact for the jury.

With reference to this last proposition, it is not contended in the case at bar that the plaintiff, Mr. Carter, suspected or had any reason to suspect that the title of Walter Bourke to the premises which he was purchasing was defective. It was shown by uncontroverted testimony that the condition of the records, county records as well as the entry in the United States land office, at the time of the purchase by Carter, showed the title to rest in his grantor, Walter Bourke, and there being no allegation in the answer of the defendants, or testimony offered, to show that Mr. Carter did not enter in good faith or claim under deed in good faith, there was nothing to submit to the jury so far as this question was concerned.

He, therefore, clearly entered under color of title, and under such entry his possession was good as against any intruder, and that to the extent of the boundaries described in the deed under which he entered.

In the case of Gregg *vs.* The Lessees of Sayer, in the 8th Peters, 253-254, in which the question was raised as to the effect of a deed impeached either for fraud in the grantor or want of estate in him co-extensive with the terms of the instrument, the Court says:

"But it is not necessary to decide whether these conveyances were fraudulently made by Ormsby or not. The important point is, to know whether Gregg and wife had any knowledge of the fraud, if committed, or participated in it. This knowledge, the Court charged the jury, was immaterial; as the fraud of Ormsby rendered the deeds void, and, consequently, they could give no colour of title to an adverse possession. The instruction is clearly erroneous. If Ormsby be justly chargeable with fraud, yet if Gregg and wife did not participate in it; if, when they received their deeds, they had no knowledge of it, there can be no doubt that the deeds do give colour of title, under the statute of limitations. Upon their face, the deeds purport to convey a title in fee; and having been accepted in good faith by Gregg and wife, they show the nature and extent of their claim to the premises."

And further, in the case of Wright *vs.* Mattison, 18 Howard, page 57, Mr. Justice DANIELS announces the doctrine that color of title, even under a void deed, had always been received as evidence that the person in possession claims adversely to all the world. This doctrine is taken by the Court from the case of Pillows *vs.* Roberts, in 13th Howard, 472.

And further, in the case of Wright *vs.* Mattison, in the 18th Howard, on page 59, the Court says:

"What is color of title, is a matter of law, and when facts exhibiting the title are shown, the Court will determine whether they amount to color of title."

The utmost that can be claimed in the case at bar against the good faith of the plaintiff under the undisputed facts of the case, could in no way connect him with any act of bad faith on the part of his grantor, nor do the admitted facts point to any means or method by which plaintiff could have advised himself of the existence of any controversy in regard to the validity of either the scrip or the entry under it by Walter Bourke, or on his behalf by his attorney in fact. The action of the land office in allowing the entry, and the regularity of the proceedings on their face were such as to commend the title to any ordinary purchaser.

In the case of Gregg *vs.* Lessees of Sayer et al., in 8th Peters, page 244, it is distinctly held, that fraud will never be presumed, though it may be proved by circumstances. Where an act doesn't necessarily import fraud; where it has been done more likely through a good than a bad motive, fraud should never be presumed. That even if the grantor in deeds be justly chargeable with fraud, but the grantees did not participate in it, and when they received their deeds had no knowledge of it, but accepted the same in good faith, the deeds upon their face purporting to convey a title in fee, and showing the nature and extent of the premises, there can be no doubt that the deeds do give color of title, under the statute of limitations.

In the case of Bevan *vs.* Taylor, 1st Wallace, page

641, Mr. Justice SWAIN says: "A void deed taken in good faith is a sufficient color of title," citing Wright *vs.* Mattison, 18th Howard, 50.

In the case of Ewing *vs.* Burnet, 11 Peters, page 41 (on page 54), the Court in speaking of the payment of taxes by a party claiming possession, says:

"The payment of taxes upon property for twenty-four years is powerful evidence of a claim of right to the whole lot."

In the case at bar, plaintiff paid the taxes on the demanded premises from the time of his purchase up to the time of the ouster by defendants. (Trans., pages 43-44.)

There was no question to leave to the jury in this case. The entry under the deed being admitted, and no claim of collusion, bad faith or fraud being made against plaintiff, so far as his entry under the deed is concerned, the only question remaining was one of law for the Court to decide, viz.: That he entered under color of title, and that he had color of title, and that it was co-existent with the premises described in the deed, under which he entered; that the deed being recorded under the laws of the Territory, this record was notice to all the world of the plaintiff's claim to the premises. That the defendants were naked trespassers under the admitted state of facts, entering without title, not claiming entry under any

grant of the United States or under any person who claimed under such grant, nor by virtue of any statute of either the United States or the Territory of Idaho.

We must not be misled by the assertions contained in the record and testimony with reference to the "townsite," "town lots" and "town organization." There was no townsite covering the premises sued for at the time of the entry of the defendants, or prior thereto, such as the law recognized, either under the laws of the United States or of the State of Idaho.

The proceedings of the Commissioners (Trans., page 104) could in no way affect the character or measure of the plaintiff's rights to the premises.

It is contended that the marking of lots within the block, even conceding, for the purpose of argument, that such lots were marked, was done in the performance of any act that would be recognized as official under any law. The cases that have been relied upon by defendants to support their position in this connection, have all been cases in which the townsite was legally located and the marking of the lots an official act.

We submit that if the plaintiff aad seen fit, for his own private purpose, to subdivide his original possession and holding, that it would not affect the measure of his possession or change the relation thereof as between him and the public.

The acts of location and recording alleged to have

been done by defendants could confer no rights upon them. There was no law recognizing such acts confering title.

The rule of law governing possessory rights, prior possession and evidence of title in Idaho, is stated in the case of Feirbaugh *vs.* Masterson, 1st Idaho, page 136. The Court therein holds:

First. That it is a well settled rule in relation to possessory rights, that prior possession is *prima facie* evidence of title.

Second. That to entitle the party to hold by right of prior possession, there must be actual *bona fide* occupation, a *possessio pedis*, a subjection to the will and control.

Third: That it is not necessary that the occupant shall cultivate the property claimed. It is sufficient if it be subjected to his use in the manner pointed out; neither is a particular kind of enclosure required. Where a party is in possession of land marked by distinct monuments and boundaries, whether the same be natural or artificial, enclosure, claiming title to the whole tract, the possession of a part so occupied will draw after it the possession of the whole.

Fourth. That in relation to public lands which are not mineral lands, the title as between citizens of the Territory, where neither connects himself with the Government, is considered as vested in the first

absolute possessor, and to proceed from him. This possession must be actual and not constructive.

Fifth. Where reliance is placed upon the prior possession of the plaintiff, or by the parties through whom he claims, such possession must be shown to have been actual in him or them. By actual possession is meant a subjection to the will and dominion of the claimant, and is usually evidenced by a substantial enclosure, by cultivation, or by appropriate use, according to the particular locality of the property.

Sixth. That where the lines were pointed out to the defendant by plaintiff with reasonable accuracy, there is no good reason why actual notice is not equally good so far as bringing home to the defendant a knowledge of the plaintiff's rights are concerned, as that afforded by stakes or like monuments.

Seventh. That having gone into actual possession of a portion of the premises, plaintiff was entitled to a reasonable length of time in which to enclose them. That what this length of time should be must for the most part depend upon the particular circumstances and locality of each claim.

The Revised Statutes of Idaho, section 2976, provides:

"Any instrument affecting real property, which previous to the time this Code takes effect, is copied into the proper book of record, kept in the office of any

County Recorder; imparts notice of its contents to subsequent purchasers and incumbrancers, notwithstanding any defect, omission, or informality in the execution of the instrument, or in the certificate of acknowledgment thereof, or the absence of any certificate; but nothing herein affects the rights of previous purchasers or incumbrancers. Duly certified copies of the record of any such instrument may be read in evidence, with like effect as copies of an instrument duly acknowledged and recorded, provided it be first shown that the original instrument was genuine."

The warranty deed from Bourke to plaintiff was recorded in Shoshone County, Idaho, where the land is situated (Trans., pages 39-40). Said deed refers on its face to the entry of the scrip in the United States land office. Defendants, therefore, in addition to the notice of the stakes on the ground and the plat which they themselves offered in evidence showing the block and its boundaries (Exhibit No. 12, attached to Trans.), had both actual and constructive notice of the actual possession of the plaintiff by virtue of his acts in connection with the premises, and his actual residence by his tenants thereof at the time of the entry by them.

The rule stated by the Supreme Court of Idaho in Feirbaugh *vs.* Masterson, 1st Idaho, page 135, as to the character and sufficiency of evidence necessary to establish actual possession, establishes the rule to be

followed by the courts of the United States, in construing the law of Idaho applicable to suits for the possession of lands, the title of which remains in the United States.

McKeen *vs.* Delancy, lessee, 5th Cranch, 22.

In Hinde et ux. *vs.* The Lessee of Charles Vattier, 5th Peters, 398, the Court says:

"There is no principle better established, or more uniformly adhered to in this court, than that the circuit courts, in deciding on titles to real property in the different states, are bound to decide precisely as the state courts ought to do. Wilkenson *vs.* Leland, 2 Peters, 656. The rules of property and of evidence, whether derived from the laws or adjudications of the judicial tribunals of the state, furnish the guides and rules of decision in those of the union, in all cases to which they apply; where the constitution, treaties, or statutes of the United States do not otherwise provide."

Sears *vs.* Eastburn, 10 How., 187.
Wilson *vs.* Fine, 38 Fed., 789,

This rule now exists by virtue of the Act of 1872, Revised Statutes U. S., section 914.

Plaintiff alleges that he was seized in fee, and on a particular date was ousted by the defendants. Defendants show no title in themselves to the land demanded, but assert that the plaintiff's claim of title by virtue of the entry made by his grantor was void,

and on this defendants seek to defeat plaintiff's right of recovery. This brings them clearly within the rule laid down in Christy *vs.* Scott, in the 14th Howard (U. S.), page 292, wherein the Court says:

"According to the settled principles of the common law, this is not a defence to the action. The plaintiff says he was seized in fee, and the defendant ejected him from the possession. The defendant, not denying this, answers, that if the plaintiff had any paper title, it was under a certain grant which was not valid. He shows no title whatever in himself. But a mere intruder cannot enter on a person actually seized, and eject him, and then question his title, or set up an outstanding title in another. The maxim that the plaintiff must recover on the strength of his own title, and not on the weakness of the defendant's, is applicable to all actions for the recovery of property. But if the plaintiff had actual prior possession of the land, this is strong enough to enable him to recover it from a mere trespasser, who entered without any title."

That the plaintiff had actual possession of the premises sued for, there can be no doubt. He had two dwelling houses erected on the north half of Block 22, which were inhabited by his tenants at the time of the entry by defendants. This would be actual possession of the entire block described in the deed under which he held.

Campbell *vs.* Rankin, 99 U. S., 261.

2 Greenleaf on Evidence, § 311.
Brobst *vs.* Brock, 10 Wallace, 531.

This proposition is fully covered by the first instruction asked by plaintiff, and refused by the Court, as set forth in the 22d assignment of error (Trans., page 132).

There has been no retreat from the doctrine stated by the Supreme Court of the United States in Christy *vs.* Scott, above cited, which is re-affirmed in the case of Sabbarego *vs.* Maverick, 124 U. S., 297.

The facts stated by plaintiff's witness, Mrs. Wallace (Trans., pages 70-71), that the defendants entered in the night time, about 10 o'clock, and were engaged all during that night in taking forcible possession of the premises is nowhere denied by the defendants, and such entry by defendants is to be taken into consideration under the rule stated in Atherton *vs.* Fowler, 96 U. S., 514, also in the case of Frisby *vs.* Whitney, 9th Wall., 187.

To enable defendants in this case to defend their possession successfully, upon their own claim of title, that title must be shown to be a good substantial legal title, superior in law to that set up by plaintiff, otherwise it opposes no legal bar to the recovery in this action.

Lessees of Hickey et al. *vs.* Stewart et al., 3d How., 759.

The Revised Statutes of Idaho, of 1878, section 4538, provides:

"An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim."

This is the statute under which this action would have been maintained, if tried in the Territorial or State courts of Idaho.

The case of Sabbarego *vs.* Maverick, 124 U. S., 261, we think establishes the doctrine that to entitle plaintiff to recover lands by virtue of prior possession in an action brought against an intruder, a wrong doer, or a person subsequently entering without right, it is sufficient to show that the possession of the plaintiff was in the first instance under color of title and that it has been continuous and without abandonment.

In the case of Wilson *vs.* Fine, 38 Fed. Rep., 789, the Court holds, that prior possession of real property is a sufficient legal estate therein to enable a party to maintain ejectment in the United States Court for the recovery of the possession of the same *from an intruder*, and bases its conclusion on the cases of Whitney *vs.* Wright, 15 Wendell, 179, and Christy *vs.* Scott, 14 How., 282.

The assignments of error from 22 to 34 inclusive, are directed against the refusal of the Court to in-

struct the jury on the questions affecting plaintiff's possession. We think that upon the undisputed facts in this case the Court should have instructed the jury as requested. That the plaintiff having introduced evidence showing that prior to the entry of defendants on the north half of Block 22, plaintiff erected two houses on said north half of said block, and that at the time of the entry of defendants, plaintiff was in the actual possession of these houses, by tenants, that such possession is actual possession of all of the said north half of said Block 22, and that the verdict must be for the plaintiff. The propriety of this instruction requested by plaintiff, did not depend upon any controverted fact in the case, and when taken in connection with the deed, constituted color of title in the plaintiff under which he entered, and the additional fact that at the time of the entry of plaintiff, on the face of the records the title which he took under the deed was perfect, made it incumbent upon the Court to give the instruction which would have, in effect, taken the case from the jury.

The plaintiff offered in evidence the title from Walter Bourke resting upon a deed from him, and the defendants attack this title on the ground that the scrip under which the entry was made had been canceled by the issuance of duplicate scrip by the Interior Department. The plaintiff replied to this that the Interior Department had no authority to issue dupli-

cate scrip in cancellation of the original scrip, and that Walter Bourke's title by reason of the entry under the original scrip was good, and that any entry made or claimed to have been made by him under duplicate scrip was void.

Upon this question, involving the construction of the laws of the United States under which this scrip was issued, and the construction of the right of the Interior Department to cancel this scrip by issuance of duplicate scrip, the case came into the United States Court by removal from the State court. These questions are still involved in the consideration of this case, and upon them we rely in contending for the jurisdiction of the Court herein to determine this writ of error.

The Circuit Court of Appeals in passing upon this question (Trans., page 139), says:

"The plaintiff, therefore, not having *legal title* could not recover except on prior possession, and that the Court did not err in instructing the jury that they should disregard them as evidence explaining plaintiff's entry and possession in good faith."

Citing the cases of Langdon *vs.* Sherwood, 124 U. S., 74, and Johnson *vs.* Christian, 128 U. S., 382, with other authorities.

This pre-supposed two things that we do not admit:

First. That under the statutes of Idaho, under which this suit was brought, the action was in strict ejectment.

Second. That the commissioner of the general land office had canceled the entry.

We maintain:—First. That the distinction between forms of action is abolished by the statutes of Idaho hereinbefore cited, and that the elements that constitute an action in ejectment with reference to the necessity of plaintiff's possession, while existing in the facts as pleaded, do not control or limit the Court to the rules governing ordinary actions in ejectment. That it is simply a suit to determine the right of possession under a statute.

Second. We contend that the act of the commissioner in canceling the entry made by plaintiff's grantor was absolutely void. That there is no authority existing under law authorizing the issuance of duplicate scrip; that the act of the department in issuing such duplicate scrip could in no way affect the validity of the original scrip; that the entry under the original scrip by Bourke is the only valid entry of land which he made or could make; that there was no inhibition against Burke's selling to plaintiff; that the entry and deed was evidence of title, as well as of possession and good faith, and that the whole question was one of law to be determined by the Court.

The denial, in the answer, of plaintiff's title in the face of the title exhibited at the trial, did not authorize the submission of the plaintiff's title to the jury.

It was a question of law, and their verdict is not conclusive or even instructive on the subject.

The Circuit Court of Appeals then holds (Trans., pages 139-140) that the instructions given by the Court obviated the necessity of giving the first and second instructions asked, which were, in effect, for a peremptory verdict for the plaintiff, and that Court in effect holds, that should the jury find that the plaintiff after purchasing and entering into possession of a distinct tract of land, Block 22, and building thereon three houses, said block having the boundaries marked by posts at the corners as well as by side-walks, should see fit for his own convenience to place other stakes thereon, for the purpose of marking the blocks into subdivisions termed lots, that this act of the plaintiff's would change the character of his possession as to the whole and render it necessary for him to enclose each separate lot. This question was, in effect, left to the jury by instruction given and commended by the Circuit Court of Appeals (Trans., page 140). Brobst *vs.* Brock, 10 Wall., 531, holds that the survey and marking of the exterior lines of the tract were sufficient, and that possession of any part was possession of the whole:

Aside from the contention of the defendants that the scrip upon which the entry was made had been canceled, it may be contended that the entry was void within the rule laid down in Felix *vs.* Patrick, 145

U. S., 317, but an inspection of the record in this case will show a marked distinction between that case and this. It is not charged or claimed here that the entry by the attorney in fact was upon a stale power of attorney and quit-claim deed, or that it was not *bona fide* on the part of the attorney in fact and for the benefit of Walter Bourke, the scripee.

Myrick *vs.* Thompson, 99 U. S., 291.

This leaves but a single question to be considered so far as the validity of the scrip entry was concerned, viz., as to whether or not the action of the Land Department in canceling the scrip was unlawful, and we have searched the statutes and reports in vain for any authority vested in the Commissioner or Secretary to either issue duplicate scrip or scrip under any condition that might arise.

The ruling of the trial court and of the Circuit Court of Appeals, that ejectment could not be maintained upon an entry of land based upon Sioux scrip, for the reason that the legal title was not thereby vested, seems to us to rest in much doubt.

No provision is made by the Act of July 17th, 1854, for the issuance of patent in the case of entries made under Sioux half-breed scrip. The title is just as perfect before the issuance of patent as after, if any patent should issue thereon, it adds nothing to the dignity or measure of the title vested by the entry.

By the location of Sioux half-breed scrip certificate, the title of the United States passes to the grantee. By a reference to the law providing for the issuance of the scrip (Vol. 10 Statutes at Large, 304) it will be seen that no patent is provided for, nor is one necessary to pass the title. The law provides for an *exchange* of lands, the United States agreeing to permit the holder of any certificate to locate it upon *any* other of the lands specified in it, and upon his doing so, the transaction was complete.

"No certificate of purchase is to be issued—the scrip and application instead of certificate of purchase, being the instruments of title which are to be returned to this office in this class of business."

Circular letter of Secretary of Interior, May 28th, 1878.

In almost all other cases the law provided for the issuance of patents to persons who procured lands from the Government, even when the law operated as a present grant, but in this instance none was provided for. Whatever it may have been deemed wise to do in the way of making patents, certainly the law did not require it, and in looking at the statutes we are forced to the conviction that the location of the scrip on the land was all that was contemplated by the law to pass the title.

Rutherford *vs.* Green's Heirs, 2d Wheaton, 193,

and Landreau *vs.* Hanes, 21 Wall., 521, are examples of this class of title. Patent was not necessary, title passed by location. United States land scrip has always been treated as real and not personal property.

Volume of the Opinions of U. S. Attorney General, 382.

The grantee had title to the lands in lieu of which this land was given, and the issuance and location of the scrip on other lands had the effect to place them, as to title, in their original position. When, therefore, the officers of the United States land office received the scrip of Walter Bourke, and certified that he had located it on the land he had the title to it, if the United States owned the land, when he made his location. Whether we rest the argument for the plaintiff on the doctrine that he entered under the deed or that his title was by virtue of his grantor's purchase through the scrip location, the ruling and instructions of which we complained are equally erroneous, for they, in theory and in words, repudiated the scrip location and the deed to plaintiff as evidence of title, and put the plaintiff's entire case and right of recovery upon his ability to establish actual, exclusive, prior possession, existing at the date of defendant's entry, and while we insist that this proof is conclusive and that the Court should so have instructed the jury, yet the verdict shows how prejudi-

cial these rulings of the Court were, and how easily a jury eager to conciliate a mob of nocturnal land jumpers at the expense of a single individual could be influenced to sacrifice the most sacred rights of property, in a special case.

Respectfully submitted,

W. B. HEYBURN,
ALBERT ALLEN,
Attorneys for Plaintiff in Error.

J. K. Lambly, the Law Printer, Spokane.

166-493

Office Supreme Court, U. S.
FILED
MAR 15 1897
JAMES H. McKENNEY,
CLERK

166-493

Supreme Court of the United States.

October Term, 1896.

No. 250.

EDWIN D. CARTER, PLAINTIFF IN ERROR,

vs.

CHARLES RUDDY, CHARLES ROBBINS, MICHAEL McMURRAY, FREDERICK A. STEVENS, M. J. DONNELLY, C. M. PATTERSON, JOHN DOE AND RICHARD ROE.

In Error to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF OF DEFENDANTS IN ERROR.

EDGAR WILSON,
Attorney for Defendants in Error.

Statesman Printing Co., Boise, Idaho.

16

Supreme Court of the United States.

October Term, 1896.

No. 250.

EDWIN D. CARTER, PLAINTIFF IN ERROR,

vs.

CHARLES RUDDY, CHARLES ROBBINS, MICHAEL McMURRAY, FREDERICK A. STEVENS, M. J. DONNELLY, C. M. PATTERSON, JOHN DOE AND RICHARD ROE.

In Error to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF OF DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

Ejectment. Complaint filed April 12, 1889. July 3, 1890, Idaho became a State. July 14th following, plaintiff filed a petition for transfer of said cause to the United States Circuit Court for the District of Idaho, upon the following grounds:

1st. That at the time of the commencement of the action the land and premises in dispute and sought to be recovered were, and at all

times since have been, and now are, of the actual value of more than five thousand dollars, ($5,000).

2d. That at the time of the commencement of said action the plaintiff was, and at all times since has been, and now is, a citizen of the State of Wisconsin, and that at the time of the commencement of said action all and each of defendants were, and ever since have been, and now are, citizens of the Territory, now State, of Idaho.

3d. That a Federal question was involved, in this: Calling for the construction by the court of the laws of the United States authorizing the issue and location of Sioux Half-Breed Scrip, issued under the Act of Congress, approved July 17, 1854, and also the construction of Sections 2387 to 2389, Revised Statutes of the United States, relating to townsites upon the public lands, as well as the determination of the question whether Section 4556 of the laws of Idaho is or is not inconsistent with the laws of Congress governing the possession and disposition of the public lands.

Upon this petition the cause was transferred.

The premises involved are certain lots situated in the town of Wallace, Idaho, being all of the lots in the north half of block No. 22, except lots 12 and 20.

The plaintiff alleges seizen and possession and

right of possession on the 19th day of February, 1889, of each of these lots, which averments were separately and specifically denied by each of the defendants. The defendants further averred that on said 19th day of February, 1889, the said lots entered, held, claimed and improved by them, were public lands of the United States, vacant and unoccupied; that they entered, located and appropriated said lots as residence or town lots, and after so entering they placed written notices thereon, describing the lots located, with the name of the locator and date of location, enclosed the same, built a substantial house thereon and have ever since resided upon the same.

The defendant Ruddy claimed lots 2 and 4, entered on the 19th day of February, 1889.

The defendant Robbins claimed lots 10 and 24, entered and located the 25th day of February, 1889.

The defendant Murray claimed lots 6 and 8, entered and located February 19, 1888.

The defendant Stevens located and appropriated lot 18.

The defendant C. M. Patterson claimed lot 22, entered and located March 7, 1889.

The defendant Donnelly claimed lots 14 and 16, located and entered February 24, 1889.

The answers were filed June 24, 1889. The defendants demanded separate trials, which

demands were refused, and the case was tried jointly as to all.

The facts shown at the trial were substantially as follows:

The tract, consisting of eighty acres unsurveyed public lands of the United States, upon which the town of Wallace now stands, was surveyed by George R. Trask May 30th and 31st, 1886. The field notes were filed in the United States Land Office, and upon this plat the Register and Receiver's receipt was issued. (Exhibit "A," Transcript, page 34.)

The field notes were designated as "Field Notes of Survey of the claim of W. R. Wallace, in Placer Center Mining District, Shoshone County, Idaho Territory, as officially surveyed for United States Patent, by George R. Trask, United States Deputy Mineral Surveyor. Surveyed May 30th and 31st, 1886."

Upon this tract Sioux Half-Breed Scrip No. 430, Letter C, was located by said Wallace, Walter Bourke being the scripee, and the Register and Receiver's receipt issued to Wallace under date of June 5th, 1886. Soon after the survey of the 80-acre tract for the aforesaid scrip entry, Trask, at the request of Wallace, surveyed the same into blocks, lots and streets, platted the same, made a map and marked the blocks upon the ground. Upon many of the blocks he staked the lots upon the ground. This he did with reference to block 22.

The lots were 25 feet by 100 feet in depth, running to an alley in the middle of the block, the alley being 25 feet wide.

Exhibit "C," Trans., page 39, describes the premises conveyed thereby as follows:

"All that lot, piece, or parcel of land situate, &c., in Wallace, County of Shoshone, Territory of Idaho, particularly described as follows, to wit: Block 22 (twenty-two) in said town of Wallace, consisting of twenty-four town lots, each 25x100 feet, and bounded on the north by Lockey street, on the south by Bank street, and on the west by Sixth street, on the east by Seventh street; the title of said land having been vested in the party of the first part by location of Half-Breed Sioux Scrip, issued to said Walter Bourke under an act of Congress of July 17th, A. D. 1854, in exchange for lands held by said party of the first party at Lake Pepin, Minnesota, and now located and duly recorded in the United States Land Office, with field notes of survey, as provided by said Act of Congress, at Cœur d'Alene City, Idaho Territory."

This deed defines the tract as twenty-four town lots 25 by 100 feet, and designates the source of the title under which the grantor claimed and conveyed.

The block was never cleared or inclosed by the plaintiff. The timber was taken therefrom and hauled to his mill but for that purpose only. The cutting was apparently done only

for that purpose. Snags, stumps and felled timber were left upon the premises and no evidence of possession left, either by inclosure or improvements upon the lots located by the defendants. Plaintiff erected buildings on lots 12 and 20. The lots 2, 4, 6, 8, 10, 14, 16, 18, 22, and 24 were not improved or occupied at the time of the entry of the defendants.

An attempt was made to show an inclosure by means of a sidewalk, or a partial inclosure of the block on the west side, and a part of the north side, and about 50 feet of the south side. The so-called sidewalk on the west side was a footway about four feet wide, built for the purpose of accommodating passengers from the depot to the north of Cedar street, leading from Arment's hotel to the depot of the N. P. R. R. and was not built for the purpose of inclosing the block or improving the same, but was built in 1887 after the railroad came in, for the purpose of bringing travel from the depot down Sixth street to the hotel of the plaintiff, the Carter House, erected on block 21. (See Hanley's testimony, Trans., page 116.) The piece of sidewalk, so-called, on the south side of block 22, consisting of three planks laid lengthwise, from the corner of Sixth street, running east 50 feet to the porch in front of the building erected by McKissick on lot 5 in block 22, said lot 5 having been purchased by McKissick from

plaintiff. This sidewalk was built in the fall of 1888 by C. A. Baldwin for one Lane, a tenant of McKissick, and paid for by Lane and not by plaintiff. (See Baldwin's testimony, Trans., page 115.)

The so-called sidewalk on the north side consisted of a footway four feet wide and was built in 1888 to connect the building on lot 20 with Sixth street, and was not built for the purpose of inclosing the block, and not erected until after the railroad came in 1887.

The building on lot 12 was not erected until 1887, and was left without a connection with Sixth street until the footway from lot 20 was built in 1888.

An effort was made to show that plaintiff had otherwise improved block 22, by bringing water thereon. Carter had brought water to his hotel on block 21. Afterwards the water was taken out above and beyond the town of Wallace on the mountain side, and a company organized for the sale of water to the citizens of the town, and known as the Wallace Water Company. Carter was one of the promoters of the scheme and a shareholder, and received his share of the profits. The occupants of block 22 bought this water as furnished to them and other citizens of the town. (See Ruddy's testimony, Trans., page 111; Moffit, page 64.)

It was shown upon the trial that the location

made June 5th, 1886, by Wallace, attorney in fact for Walter Bourke, upon the 80-acre tract in question was canceled by the Commissioner of the General Land Office on January 24th, 1887, the reasons therefor being set forth at length in the decision of the Commissioner. This scrip entry was canceled on the ground that a duplicate of said piece of scrip had been issued by the proper authority, and that the same was located March 9th, 1880, by Henry T. Wells, attorney in fact, upon 80 acres in the Territory of Dakota, and that a patent therefor was issued December 10th, 1881.

Following this order of cancellation, Wallace was at once notified thereof by the Register of the proper Land Office.

The evidence further shows the proceedings in the General Land Office relating to the issue and cancellation of said scrip. It shows the entry by power of attorney under the duplicate in Dakota, including the issuance of the patent thereon.

The following facts are clearly established:

1st. That the duplicate scrip was issued by the proper officers of the Government after satisfactory evidence that the original had been lost.

2d. That this scrip was located and surrendered in March, 1880, and a patent for 80 acres issued to the scripee, Walter Bourke. That by

such location, surrender and patent the law of July 17, 1854, was fully satisfied, the scrip not being assignable or transferable. The scripee had received his 80 acres of land in lieu of that relinquished by him under the terms of the above mentioned Act.

The decision of the Commissioner cancelling the location was sustained by the Secretary of the Intertor.

In 1888 the inhabitants of the town of Wallace were, by the Board of County Commissioners. duly declared a body corporate and politic, by the name of the Inhabitants of the Town of Wallace, and W. R. Wallace was appointed Chairman of the Board of Trustees.

In February, 1889, two years after the decision of the Commissioner cancelling this Half-Breed Sioux Scrip, the defendants entered and located the lots claimed by them respectively, and inclosed and improved the same by building thereon.

On the 19th day of February, 1889, and after several hundred lots were located by difierent citizens of the town of Wallace, Howes, the agent of plaintiff in error, came with a written notice to locate lots 2 and 4, but found defendant Ruddy in possession. Howes wrote several notices and located lots in the town on the 19th of February outside of block 22, while his partner, King, posted notices, written by Howes, on

the 19th and located lots 9 and 11 in this block 22. In fact, the witnesses examined on both sides, with one or two exceptions, located lots in Wallace at this time, including Bell, another agent of Carter.

In fact, on the 19th of February, 1889, and within a very few days afterwards, nearly every lot in the town of Wallace, not inclosed or built upon, was located by the inhabitants thereof.

It will further be observed that the map introduced by Carter (Exhibit "D") does not correctly designate block 22. It is not cut up into lots according to the calls of his deed (Exhibit "C"), and the alley in the center of the block is not shown thereon.

We also call attention to the fact that Plaintiff's Exhibit "A" was offered and introduced in evidence over the objections of the defendants.

Argument.

We first submit that this court has no jurisdiction to review by writ of error the decision of the Circuit Court of Appeals for the Ninth Circuit. This cause was taken to the latter court by writ of error to the United States Circuit Court for the District of Idaho.

By the sixth section of the Act of March 3, 1893, to Establish Circuit Courts of Appeal,

etc., the judgments and decrees of the Circuit Courts of Appeals are made final in all cases in which the "Jurisdiction is made dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different States."

The petition for removal assigns, as the Fedesal questions involved:

1st. Diverse citizenship.

2d. Plaintiff's claim of title under the deed from Walter Bourke, by virtue of the location of the Sioux Half-Breed Scrip issued him under the Act of Congress referred to; also the construction of the United States statutes relating to townsites on public lands, as well as the determination of the question whether Section 4556 of the laws of Idaho is or is not consistent with the laws of Congress governing the disposition and possession of the public lands.

We submit that there is no Federal question involved. The certificate of location (Exhibit "A"), and the deed thereunder, are incompetent as evidence to prove title, and occupancy and possession are matters of fact and involve no Federal question. Nor does Section 4556, Revised Statutes of Idaho.

If the diverse citizenship of the parties, the plaintiff being a citizen of a State and the defendants all citizens of the Territory, presented a Federal question, that was the only

Federal question involved in the case, and under Section 6 of the Appellate Court Act, above quoted, the dscision of the Court of Appeals was final and cannot be reviewed by this court.

The trial court, following a long line of decisions holding that ejectment can only be maintained upon the strict legal title, to wit:

Fenn vs. Holme, 21 Howard, 481;
Hooper vs. Scheimer, 23 Howard, 235;
Bangell vs Broderick, 13 Peters, 436;
Foster vs. Mora, 98 U. S., 425;
Langdon vs. Sherwood, 124 U. S., 85;

excluded the certificate (Exhibit "A") and the deed (Exhibit "C") as evidence of title, and instructed the jury as follows:

"I now instruct that in an action like this in the United States courts, such certificate issued by the land office of an entry of land cannot be received as any evidence of legal title, and the deed referred to (Exhibit "C") being based upon such an entry cannot be considered as evidence of a legal title, or of a title in fee, and as evidence of title you will entirely disregard them, and that the only consideration you can give to either said certificate of entry or said deed, is as evidence to explain plaintiff's original entry upon the premises, to explain his claim to the possession thereof, and to show his good faith in the claim he asserts."

If, under the authorities above quoted, the certificate is incompetent testimony to prove title,

and the jury are to disregard both the certificate and the deed, where, then, we submit, is the Federal question involved, aside from the possible question of diverse citizenship?

We now ask for a dismissal of this case on the ground that neither the trial court, the intermediate appellate court, or this court, has had or has jurisdiction of the cause, either upon the ground of diverse citizenship or upon the ground that a Federal question was involved, as appears by the transcript herein, and for the reasons above given. And, in any event, we submit that this court has no jurisdiction to review the decisions of the Circuit Court of Appeals, as the only possible Federal question involved was that of diverse citizenship, upon which jurisdiction the decision of the Court of Appeals became final.

We raise this objection and make this motion at this stage of the proceedings, as we understand it can be made at any stage of the proceedings in any court of the United States.

In further support of this contention we call the attention of the court to the extensive argument filed in behalf of the plaintiff in error. Upon page 24 of their brief, after referring to the introduction of the deed (Exhibit "C"), they say:

"Upon this question, involving the construc-

tion of the laws of the United States under which this scrip was issued, and the construction of the right of the Interior Department to cancel this scrip by issuance of a duplicate scrip, the case came into the United States court by removal from the State court. These qustions are still involved in the consideration of this case, and upon them we rely in contending for the jurisdiction of the court herein to determine this writ of error."

They base, then, their contention for jurisdiction in this court upon their alleged claim of title by virtue of the scrip entry, yet they make no argument and present no authorities in support of the validity of this entry. They simply present their contentions in a few words, on page 35, without argument or authority, and on page 37, after briefly referring to the case of Felix vs. Patrick, 145 U. S., 317, and attempting to distinguish the case at bar from the same, they say:

"This leaves but a single question to be considered so far as the validity of the scrip entry was concerned, viz., as to whether or not the action of the Land Department in cancelling the scrip was unlawful, and we have searched the statutes and reports in vain for any authority vested in the Commissioner or Secretary to either issue duplicate scrip or new scrip under any condition that might arise."

Counsel for plaintiff in error also cite, on page 37 of their brief, Myrick vs. Thompson, 99 U.

S., 291. In this connection we further submit that should this court decide that it has jurisdiction, by virtue of the Federal question involved in the said scrip location, then it should examine this record no further than to determine the correctness or incorrectness of the decision of the Circuit Court of Appeals thereon. In other words, if the decision of the Circuit Court of Appeals thereon was correct, then this court should examine and decide no question involved in the record except the question presented as the basis of this court's jurisdiction to review the judgment of the intermediate appellate court. This we understand is the rule applied to the decisions of the State courts of last resort, and we know of no reason why the same rule should not be applied with reference to the review of the judgments and decrees of the Courts of Appeal.

In Myrick vs. Thompson, 99 U. S., 291, it was decided as follows:

"Where the Federal questions involved in a case were correctly decided by the State Supreme Court, the judgment of that court must be affirmed without determining any other questions not of a Federal character."

In this case the court says:

"Six other defences were set up by the defendants, as appears by the opinion of the State Supreme Court, no one of which involves any Federal question." And further: "Remarks

are not necessary to show that none of these several defenses present any Federal question for re-examination; and having already decided that the Federal questions involved in the case were correctly decided by the State Supreme Court, the settled rule of this court is that the judgment must be affirmed, without determining the other questions not of a Federal character," citing Murdock vs. Memphis, 20 Wallace, 590.

The sixth subdivision of Section 6 of the Appellate Court Act provides: "In all cases not hereinbefore, in this section, made final, there shall be of right an appel or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs." This does not imply a review of the case beyond the question upon which the jurisdiction of the case in this court is based.

We are aware that this court has held that it will review all questions involved in the judgments and decrees of the Circuit and District Courts upon the merits where those decrees and judgments are properly before this court. But we insist that this rule does not necessarily apply to the review of the decisions of the Circuit Court of Appeals. The Act establishing the latter courts has made their decisions final, where no Federal question was involved other than the diverse citizenship of the parties. In

this case we have this condition: This court is without jurisdiction unless by virtue of the question involved in the law authorizing the issue of the original scrip, upon which the location of Walter Bourke was made. Upon this point counsel make no argument, but address their entire efforts to convince this court that the Circuit Court and the Court of Appeals committed an error upon a point in which no Federal question whatever is involved, viz., the question of possession by the plaintiff of the various lots of ground in controversy. The principal part of the argument (pages 19 to 34) is in support of their contention that the entry of plaintiff upon block 22 under the void deed (Exhibit "C") was an entry of land under color of title, and therefore the possession of the plaintiff was coextensive with the premises described in said deed.

In the American and English Encyclopædia of Law, vol. 6, page 224, the author, referring to the case of Maxfield's Lessee vs. Levy, 4 Dallas, 320, says: "A mere colorable conveyance is not sufficient to give the court jurisdiction in an action of ejectment, etc."

And we submit in this case that the "colorable conveyance" relied upon by plaintiff in error to give this court jurisdiction is insufficient, and particularly in view of the fact, as shown by the argument, that the very purpose

of this proceeding is to secure a decision from this court upon the mere question of plaintiff's possession.

II.

But the decisions of the trial court and the appellate court were correct, when they rejected the certificate and deed as evidence of title and placed the plaintiff's entire case where it should be, upon plaintiff's ability to "establish actual, exclusive prior possession at the time of defendants' entry." Upon this question the trial court instructed the jury as favorably, and, we think, more liberally, than the law would warrant.

In this connection we call attention to Sections 4040, 4043 and 4556, Laws of Idaho, which should be the rule of decision governing this case under the authorities, and section 721, Revised Statutes of the United States.

Burgess vs. Seligman, 107 U. S., page 20.

Section 4040, Revised Statutes of Idaho, is as follows:

"When it appears that the occupant, or those under whom he claims, entered upon the possession of the property under claim of title, exclusive of other right, founding such claim upon a written instrument, as being a conveyance of the property in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and

possession of the property included in such instrument, decree or judgment, or of some part of the property under such claim, for five years, the property so included is deemed to have been held adversely, except that, when it consists of a tract divided into lots, the possession of one lot is not deemed a possession of any other lot of the same tract."

Section 4556 is as follows:

"In any action for the possession of, or for any injury done to, a lot or parcel of land, situated in any city, town, or village on the public lands, the plaintiff must be required to prove either an actual inclosure of the whole lot claimed by him, or the erection of a dwelling house or other substantial building on some part thereof, by himself or some person through whom he claims, and proof of such building, with or without inclosure, is sufficient to hold such lot or parcel to the bounds thereof, as indicated by the plat of such city, town, or village, if there be one, and if there be no such plat, then to hold the same, with its full width and extent from and including such building to the nearest adjacent street, where the intervening space has not been previously claimed by adverse possession."

Section 4556 was enacted in 1864, immediately after the organization of the Territory, and under the rule laid down in Clinton vs. Englebrecht, 80 U. S., page 446, has been ratified by Congress. The Act was again ratified by the

Constitution of Idaho, and by admission of the State again ratified by Congress.

Nearly all the cases cited by counsel for plaintiff in error were actions in ejectment where defendants invoked the aid of the statute of limitations and set up adverse possession under colorable titles. But for the purpose of establishing adverse possession under a colorable title, the Idaho statute so limits possession thereunder, that where a given tract is divided into lots, "the possession of one lot is not deemed a possession of any other lot of the same tract."

The plaintiff's main contention is that the court erred in refusing his request for the instruction that plaintiff's alleged possession of one of the houses by a tenant was possession of the entire north half of block 22. The evidence clearly established that the block was subdivided into lots with an alley running through the same, and the instruction asked for would have been error in view of the evidence and the statutes of the State before quoted.

Feirbaugh vs. Masterson, 1 Idaho, 136, involved an entry upon the possession of the plaintiffs therein, of a large tract of Government land taken possession of for agricultural purposes. But in that case it was held, plaintiff's brief, page 26, "That to entitle the party to hold by right of prior possession, there must be actual *bona fide* occupation, a *possessio pedis*, a subjection to the will and control."

But a distinction has always been recognized between the fact of possession upon extensive tracts of lands occupied for agricultural purposes, and smaller tracts laid out and subdivided into blocks and lots and occupied only for town purposes. In the latter case possession does not extend, and has never been held to extend, under these statutes, beyond the lot or tract in actual occupation and possession of a party.

In this connection we think the suggestion of the distinguished Judge, who rendered the opinion for the Appellate Court, pertinent, where he makes the following suggestion near the close of the opinion:

"It may be observed that plaintiff alleged that the lots which he claims to have been in possession of tenants were 'two separate lots, pieces and parcels of land' from the land sued for. Can, then, the possession thereof be a possession of land from which they were 'separate'?"

The question of possession, we submit, was fully and fairly tried, and, as stated by the appellate court, whatever possession plaintiff took and held, and what possession he had at the time of the entries of the defendants, were submitted to the jury and they found against him, and "their verdict is conclusive unless there was error in giving or refusing instructions, or in giving or rejecting testimony."

While there are a large number of assignments of error, there are in fact but two questions presented in the brief and argument of the attorneys for plaintiff in error:

1st. The question of constructive possession, under what they term colorable title, of such a character as to entitle them to a peremptory instruction for a verdict.

2d. The question which is not argued, but upon which they claim the jurisdiction of this court depends, viz., the title acquired through the certificate of location of the canceled scrip.

If the scrip location and the deed to plaintiff did not convey the legal title, then, under the long line of decisions above referred to, ejectment cannot be maintained in the courts of the United States. And we know of no decision of this court where a plaintiff has ever maintained ejectment upon possession alone. In other words, the legal title and the legal title alone is necessary to maintain the action.

Hooper vs. Scheimer, *supra.*
Fenn vs. Holme, *supra.*
Langdon vs. Sherwood, *supra.*
Foster vs. Mora, *supra.*

None of the cases cited by counsel were decided with reference to a statute similar to Section 4040 or 4556 of the Idaho statutes above quoted. Wright vs. Mattison, 18 Howard, page

56, referred to on page 20 of plaintiff's brief as an authority, defining "color of title," was based upon the statutes of the State of Illinois, one section of which is as follows:

"That hereafter every person in actual possession of lands or tenements, under claim and color of title made in good faith, and who shall, for seven successive years after the passage of this Act, continue in such possession, and shall also during the said time pay all the taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements, to the extent and according to his or her paper title. All persons holding under such possession, by purchase, devise or descent, before said seven years shall have expired, and shall continue to pay the taxes as aforezaid, so as to complete the possession and payment of the taxes for the term aforesaid, shall be entitled to the benefit of this section."

But the Idaho statute contains a provision not embodied in the foregoing, to wit: Where the property "consists of a tract divided into lots, the possession of one lot is not deemed a possession of any other lot of the same tract."

The case of Gregg vs. The Lessee of Sayres, 8 Peters, 253 and 254, was a case likewise involving the application of the statute of limitations, where it was held that the deeds in controversy gave color of title under the statute of limitations.

On page 24 of his brief, plaintiff says the entry under the deed being admitted, and no claim of collusion, bad faith or fraud being made against plaintiff, so far as his entry under the deed is concerned, the only question remaining was one of law for the court to decide, viz: "That he entered under color of title, and that he had color of title, that it was coexistent with the premises described in the deed, under which he entered." To this we reply that the entry, under the deed of the particular lots in controversy, is not admitted, and the possession, by the plaintiff, of each and all of the lots is specifically denied, and the *fact* of possession, after a fair trial and liberal instructions, was decided by the jury against the plaintiff. And in addition to that, the plaintiff himself alleged that the lots upon which he constructed his houses and in which the tenant or tenants resided, upon which fact he claimed constructive possession of the entire half block, were "two separate lots, pieces and parcels of land."

Actual possession is necessary upon the public lands to sustain ejectment; constructive possession is insufficient.

Rivers vs. Burbanks, 13 Nevada, 408.
Brumigim vs. Bradshaw, 39 Cal., 41.
LeRoy vs. Cunningham, 44 Cal., 602.
Gray vs. Collins, 42 Cal., 156.
Tyler on Ejectment, §§ 888, 891, 899, 900, 904 and 905.

"But when the land is cut up into lots, occupancy of one is not of the other, as entry and possession of one under the conveyance which embraces several cannot be extended by construction to other lots not actually occupied."
Woods on Limitation of Actions, § 262.

We do not care to argue the question of the validity of the scrip entry. Counsel for plaintiff urges the question involved as the basis of jurisdiction, but they have not seriously attempted to present the matter to this court, and we only call attention to the fact that from the history of the Government the patent alone has been recognized as evidence of legal title, and although certificate therefor had issued, it has always been held and decided by this court that until patent issued the legal title is held in trust for the holder of the certificate. It has, too, been repeatedly decided by this court, that the Commissioner of the General Land Office and the Secretary of the Interior, under their supervisory powers, have the power to investigate, and, after notice and hearing, cancel any entry for which certificate of purchase has issued.

In this case it needs no argument to present the fallacy of plaintiff's contention, that the Land Department had no authority to issue the duplicate scrip to Walter Bourke and permit

him to make entry thereon. The original certificate was issued to Walter Bourke. Under the law authorizing its issue it was non-assignable and non-transferable, and when issued it bore the imprint of these conditions upon its face. Afterwards, and when it was shown by the beneficiary of the scrip certificate that the original had been lost, for his benefit, and for him alone, the duplicate scrip was issued and accepted in payment of an 80-acre tract in Dakota, for which patent was issued to the same Walter Bourke, and the conditions of the act under which the original certificate of scrip was issued were fully satisfied and discharged. Walter Bourke thereby received his 80 acres of land in lieu of the land surrendered by virtue of the Act of 1854; and it needs no argument before this court to establish the fact that the same Walter Bourke was not entitled to a second 80-acre tract, after receiving his patent for the land in Dakota. See Felix vs. Patrick, 145 U. S., 317.

The case of Rutherford vs. Green's Heirs, cited by attorneys for plaintiff, on page 38 of their brief, does not support their contention. That decision was based upon several Acts of the State of North Carolina, one provision of which allotted 25,000 acres of the lands reserved by the act to "Major-General Nathaniel Green,

his heirs and assigns," and in no way controls or furnishes a precedent for the case at bar.

PLAINTIFF'S ASSIGNMENTS OF ERROR.

The first and second assignments in plaintiff's brief, relate to the admission of testimony, showing duplication of the scrip and the proceedings leading up to the issuance of patent to Walter Bourke for the 80-acre tract in Dakota. These assignments are fully covered by the argument in relation to the character of the scrip entry.

The third and fourth assignments relate to the admission of evidence showing the incorporation of the town of Wallace and the sale of lots therein. This evidence was clearly admissible to show the character of plaintiff's possession.

The fifth assignment relates only to the admission of the notices of location made by the defendants Ruddy and McMurray. This evidence was clearly admissible, and plaintiff nowhere in his argument even suggests a reason in support of his *third*, *fourth* and *fifth* assignments of error.

The sixth assignment of error is based upon the following charge: "But if on the contrary it was cut up into separate and distinct lots, and so marked upon the ground and was held and treated as distinct tracts, then he must

show the possession of all thereof." This instruction was strictly in accordance with the Idaho statutes above quoted.

Assignments *seven* to *eighteen* relate to the refusal of the court to give instructions requested by the plaintiff. These assignments, with the exception of seventeen, relate chiefly to the question of constructive *possession*, and all of the objections raised are fully covered by the instructions given by the court.

The seventeenth assignment of error, relating to the payment of taxes, was taken from the case of Ewing vs. Burnet, 11 Peters, 41, where the court simply decides that "the payment of taxes upon property for 24 years is powerful evidence of claim of right to the whole lot."

Under the Idaho statute, Section 4043, in order to constitute adverse possession under a colorable title, it is necessary to show, among other things, that the "party or persons, their predecessors and grantors, have paid all the taxes, State, county and municipal, which have been levied and asseessed upon such land according to law," and "that the land has been occupied and claimed for the period of five years." The section in full is as follows:

"For the purpose of constituting an adverse possession by a person claiming title not founded upon a written instrument, judgment or decree, land is deemed to have been possessed and occupied in the following cases only:

"1. Where it has been protected by a substantial inclosure.

"2. Where it has been usually cultivated or improved: *Provided, however*, That in no case shall adverse possession be considered established under the provisions of any sections of this Code, unless it shall be shown that the land has been occupied and claimed for the period of five years continuously, and the party or persons, their predecessors and grantors, have paid all the taxes, territorial, county, or municipal, which have been levied and assessed upon such land according to law."

In conclusion, we desire to call the attention of the court to the concluding sentence of the argument in the brief of plaintiff in error, wherein the defendants are referred to as a "mob of nocturnal land jumpers," and in the same connection to the following statements, on page 31, viz: "That the defendants entered in the night time, about 10 o'clock, and were engaged all during that night in taking forcible possession of the premises," and that "such entry by defendants is to be taken into consideration under the rule stated in Atherton vs. Fowler, 96 U. S., 514, also in the case of Frisbie vs. Whitney, 9th Wall., 187."

We submit that there is nothing in this case, either in fact, or disclosed by the evidence, to warrant the suggestion above quoted, of the

application of the doctrine announced in the decisions above referred to. In Atherton vs. Fowler it was simply decided that claims to agricultural lands of the United States could not be instituted by trespass, breaking through and upon the inclosure of land that had been occupied for a long period of years and reduced to the actual possession of the occupants, but the Department of the Interior has, ever since the said decisions, construed them to apply only to those Government lands which had been actually settled upon and improved in good faith, reduced to actual possession by the occupant, and substantially inclosed and improved.

We submit that there is nothing in the case at bar suggesting even a parallel to the facts out of which the latter decisions grew.

In this case there was no inclosure, there were no improvements, and the jury, after a fair trial, has said that there was no possession.

The lands were vacant town lots and the entire 80-acre tract had been occupied for several years for town purposes, and for town purposes only.

For nearly two years after the scrip entry had been canceled these lands were all of them vacant government lands subject to entry by the first legal occupant. These defendants did only what they had a legal right to do, took possession of them and improved them with a view

of subsequently acquiring title. In so doing they found no one in possession, they interfered with the possession of no one, they committed no trespass.

Again, we repeat there was no possession and no evidence of possession of the lots or either of them located by the defendants at the time of their entry. The jury so found, and with this conclusion the court will fully concur upon a careful inspection of the transcript.

Respectfully submitted.

EDGAR WILSON,

Attorney for Defendants in Error.